Supreme Court, U.S.
FILED

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No._____

In the Supreme Court of the United States

OCTOBER TERM, 1994

D-LANDCO, an Oklahoma Corporation;
and **BARBARA LASH**
Petitioner,

vs.

STATE OF OKLAHOMA, ex rel.
DEPARTMENT OF TRANSPORTATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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68 pp

QUESTIONS PRESENTED

(1) Did Petitioner receive just compensation under Amendment V to the United States Constitution after state and local officials, working together, placed Petitioner's property in a freeze by restricting its use, reserving the land for a planned expressway and substantially depressing the value to low agricultural prices?

(2) Did Petitioner receive just compensation under Amendment V to the United States Constitution if Petitioner did not receive compensation reflecting the "highest and best" use (to-wit: commercial) of its land in the condemnation proceeding?

(3) Did Petitioner receive substantive due process under the same facts?

(4) Does the violation of the rule of sequestration by an important government appraisal witness, Mrs. Janice K. Gordon, infringe upon Petitioner's right to obtain just compensation under Amendment V and the Fourteenth Amendment to the United States Constitution?

LIST OF PARTIES

The parties before this Court are the Petitioner, D-LANDCO, Inc., an Oklahoma Corporation which is the owner of the land in this condemnation action and Barbara Lash, a former tenant of a home on the property (no longer an interested party). Respondent is the OKLAHOMA DEPARTMENT OF TRANSPORTATION (sometimes called ODOT) with principal offices in Oklahoma City, Oklahoma.

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No._____

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Petitioner,

vs.

STATE OF OKLAHOMA, ex rel.
DEPARTMENT OF TRANSPORTATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

Petitioner D-LANDCO, an Oklahoma corporation, respectfully prays that a writ of certiorari issue to review the Opinion of the Oklahoma Court of Appeals, Division III, dated Decemer 28, 1993 and the Order of the Oklahoma Supreme Court dated April 19, 1994 rejecting Petitioner's request for review thereof.

OPINIONS BELOW

The Opinion of the Oklahoma Court of Appeals, Division III dated December 28, 1993 is unreported. It is reproduced in the appendix hereto, A-2–A-5.

The Order of the Supreme Court of Oklahoma dated April 19, 1994 denying Petitioner's request for Writ of Certiorari to the Court of Appeals of the State of Oklahoma, Division III is reproduced in the appendix hereto, A-1.

The Judgment of the Tulsa, Oklahoma District Court dated April 1, 1992 which was entered upon jury verdict of the same date, is reproduced in the appendix hereto A-21–A-23.

JURISDICTION

This Petition for Writ of Certiorari seeks a review of the final order of the Oklahoma Supreme Court, a court of last resort, denying discretionary review of a decision rendered by the Oklahoma Court of Appeals, Division III affirming a jury verdict rendered in an Oklahoma trial court. Petitioner invokes the jurisdiction of this Court pursuant to *28 U.S.C. § 1257 (a)*.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved in this case are:

(1) *"Fourteenth Amendment Section 1, United States Constitution*. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States; *nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.*" (Emphasis added).

(2) *"Fifth Amendment, United States Constitution.* No person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in the actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; *nor shall private property be taken for public use, without just compensation.*" (Emphasis added).

(3) *"Article II, Section 24, Oklahoma Constitution. Private property shall not be taken or damaged for public use without just compensation.*" (The complete contents of the constitutional provision are reproduced in the Appendix A-39.) (Emphasis added).

(4) *Oklahoma Statute, Exclusion of Witnesses, Title 12, Oklahoma Statutes, Sec. 6155.* (The complete statute is reproduced on page 17-18 and Appendix A-38.)

STATEMENT OF THE CASE

This is a condemnation action. The case was filed by Respondent State of Oklahoma, ex rel., Department of Transportation ("ODOT") to condemn 28 acres of land and a single family home in Tulsa owned by Petitioner, D-

LANDCO, for the Mingo Valley Expressway which runs throughout the eastern part of Tulsa, Oklahoma. This is a federally-financed highway.

The 28 acres were a part of a larger tract of land owned by the Petitioner. The larger tract consisted, before the taking, of 139 acres. The 139 acres are bordered by 81st Street on the North and by Garnett Road on the East in the City of Tulsa. The condemned 28 acres are situated along Mingo Road between 81st Street and 91st Street.

At the time of trial (1992) the 28 acres was zoned for agricultural use (AG) and the balance of the property, 111 acres, had been rezoned in 1985 for commercial/industrial purposes (CO). This classification has 161 commercial, industrial and other uses permitted under local zoning laws.

This action was filed in 1990. Commissioners were appointed and a report assessing damages resulting from the condemnation at $1,200,000.00 was returned by them. Both parties filed demand for Jury trial. Trial occurred on March 9 to 12, 1992 and nine (9) members of a Tulsa, Oklahoma jury returned a verdict of $708,220.00 as the amount of damages suffered by Petitioner. The jury verdict and judgment rendered thereon was appealed to the Oklahoma Supreme Court and affirmed.

REASONS FOR GRANTING THE WRIT

Petitioner urges this Court to issue its Writ of Certiorari for these reasons:

1. This is a case of first impression. Petitioner's research does not indicate any prior decisions of this Court,

any federal court or any state court, in which the zoning powers of a municipality have been used to depresss land values in an eminent domain proceeding and later shown to actually have this effect. In this context the just compensation clause of the Fifth Amendment seems compromised, violated and rendered meaningless.

2. Petitioner was denied due process and equal protection in violation of both the *Constitution of the State of Oklahoma and the Constitution of the United States* when the Tulsa Metropolitan Area Planning Commission (TMAPC) and City Council, working in conjunction with and at the request of Respondent "reserved" Petitioner's property for agricultural purposes in anticipation of the future condemnation of an expressway. This action resulted in "freezing" Petitioner's property and depressing its true value at the time of condemnation. Such was the intended purpose of this "freezing" action by public officials.

3. The $708,220.00 does not reflect the value of the "highest and best use" of Petitioner's property *without government interference* in a "free and open marketplace."

4. Mrs. Jan Gordon, witness for Respondent, violated the rule of sequestration through Respondent's intermediary, *her husband*, who committed error prejudicial to Petitioner by revealing to Mrs. Gordon testimony of Petitioner's expert witnesses.

5. Petitioner did not receive just compensation which is mandated by the *Oklahoma Constitution, Art. II, Sec. 24* and the *United States Constitution, Amendment V.*

6. The Oklahoma Court of Appeals and the Oklahoma Supreme Court seemed to treat this as a zoning case. (No appeal was taken by Petitioner from adverse zoning actions.) This is not a zoning case. Zoning was a tool used by Respondent to depress the value of Petitioner's property.

PROPOSITION I

Petitioner failed to receive just compensation after state and local officials, working together, placed petitioner's property in a freeze by restricting its use through zoning laws, reserving its land for a planned expressway and substantially depressed the land's value to low agricultural prices. This also constituted deprivation of constitutional guarantees of due process and equal protection of laws.

I.
FACTS

CO (commercial/corridor/industrial) zoning was rejected by the Tulsa Metropolitan Area Planning Commission (TMAPC) and the Tulsa City Commission in order to give Respondent an opportunity to later purchase this property for the planned Mingo Valley Expressway at "low" agricultural land prices.

Petitioner believes it was denied a fair trial because of the refusal of the Tulsa City Commission, at the request and urging of Respondent, to depress land prices by rejecting

rezoning of the 28 acres. This constituted a confiscation of Petitioner's property without due process of law and was prejudicial to its constitutional rights in this condemnation action.

The opinion of the Court of Appeals contains an erroneous statement of material fact.

While recognizing that Petitioner "attempted to show that the value of the 28 acre tract of land in question was adversely effected by the failure of the TMAPC to upgrade the zoning of the land," the Court refused to recognize Petitioner's adversity resulted from the specific actions of Respondent. This is clearly shown by written documents admitted into evidence. These documents are letters from Respondent to the TMAPC intended to reserve Petitioner's 28 acres along the Mingo Valley Expressway for future roadway acquisition.

TMAPC and the City Council adopted the following staff recommendation:

> "The staff can support CO zoning on the subject tract *less and except that portion located in the proposed Mingo Valley Freeway which is to remain AG.*" (Trial Transcript pgs. 88, 89, Emphasis added by underscoring.) A-30, A-31.

The Court of Appeals opinion, further, erroneously states that the "landowner neither contested the action of the TMAPC (refusal to re-zone) nor sought another zoning classification for the 28 acres." This is not accurate. Petitioner believes this misstatement serves as a precursor of the Court's decision. In fact, Petitioner asked the TMAPC to re-zone the

28 acres for commercial purposes (CO) in Petitioner's original 1985 zoning application.

The fact is Petitioner's 28 acres, which were targeted to be condemned by Respondent, were frozen at a lower value than economically realistic in order to keep the purchase price thereof artificially low since it was located in the proposed Mingo Valley Expressway and for that reason was to remain AG.

Wayne Alberty, City Planner and former TMAPC official, testified for Petitioner. Wayne Alberty testified as follows:

> Q Why wasn't the entire 139 acres placed in a CO zoning district as D-LANDCO requested? If you know?
>
> A By policy of the staff to recommend exclusion of the portions that is within a proposed right-of-way take.
>
> Q And what's the purpose of that recommendation of the staff?
>
> A I think it is a clear cut purpose to attempt to hold down the values of the property.
>
> Q And that's what happened to the 28 acres of D-LANDCO property, isn't it?
>
> A Yes, that is correct.
>
> (Trial Transcript pg. 90.) A-30–A-32.

Another witness, Robert L. Parmele, Jr., who was the chairman of TMAPC testified about Petitioner's application to re-zone and what happened to it:

A The application was for corridor zoning CO *on the entire tract*. As I recall the staff recommendation was for approval of CO zoning on the tract except for the 28 acres, I believe that was reserved for future right-of-way of the Mingo Valley Expressway.

Q Is there a policy of reserving future expressway for the Mingo Valley Expressway and not rezoning it? At the staff level?

A I think at the staff level the policy is not to recommend approval of rezoning of future expressway right-of-way.

Q And why does the staff have that policy? If you know?

A My opinion is that they feel by reserving that right-off-way it changes the value of the property.

Q Up or down, Sir?

A Downward.

(Trial Transcript pg 191.) A-33.

II.
JUST COMPENSATION

Just compensation for property is defined as compensation for land at its highest and best use. This is the criterion for determining its fair market value and it is the function of due process to obtain the highest and best value for the landowner.

The retention of Petitioner's 28 acres in AG was a governmental action that constituted an unfair and unreasonable impact on Petitioner and was, in effect, a confiscation of its 28 acres at the lowest possible value. As noted in the commentary appearing in *9 ALR3rd 291, 304, 305*:

> "Many courts have vigorously condemned as confiscatory the action of a public body in adopting a petition for rezoning merely for the purpose of decreasing land value or preventing its proper utilization, in order to lower acquisition costs in eminent domain proceedings."

Consideration of the compensation question, Petitioner believes, begins with reference to the language of the Fifth Amendment, which provides in relevant part that private property shall not be taken for public use without just compensation. As its language indicates, and as the Court has frequently noted, this provision does not prohibit the taking of private property, but instead places a condition on the exercise of the power. See *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 87 L.Ed.2d 126, 105 S.Ct. 3108 (1985); *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 69 L.Ed.2d 1, 101 S.Ct. 2352 (1981), *Hurley v. Kincaid*, 285 U.S. 95, 76 L.Ed. 637, 52 S.Ct. 267 (1932); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 336 (1893); and *United States v. Jones*, 109 U.S. 513, 518 (1883).

This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights per se, but rather to secure

JUST COMPENSATION in the event of otherwise proper interference amounting to a taking. Government action that works a taking of property rights necessitates the constitutional obligation to pay meaningful *and* just compensation. *Armstrong v. United States*, 364 U.S. 40, 4 L.Ed.2d 1554, 80 S.Ct. 1563 (1960). Condemnation of private lands for federally-financed highways is a common example of the use of the Fifth Amendment.

III.
WHAT HAS PETITIONER LOST?

It is familiar law that the usual, but not exclusive,[1] measure of "just compensation" in condemnation actions is fair market value; i.e., the highest amount of money that would be paid for the property in question by a willing but unpressured, informed buyer, to a willing but unpressured,

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1 In *United States v. Cors*, 337 U.S. 325, 332, 69 S.Ct. 1086, 93 L.Ed. 1392 (1949), the Supreme Court pointed out although market value is the usual measure of just compensation, the courts have refused to make "a fetish" out of it because in some situations it may not be an appropriate measure of damages. For examples of the application of nonmarket value damages, see *United States v. Pewee Coal Co.*, 341 U.S. 114, 71 S.Ct. 670, 95 L.Ed. 809 (1951), *Port Authority etc. v. Hudson Rapid Tubes*, 231 N.E.2d 737 (N.Y. 1967). Market value is the proper measure of compensation where the property being valued is of a kind often bought and sold in the market, so that one is justified in concluding that the haggling of the market is likely to produce a price that a reasonable landowner would accept, were he to act as a seller. See *Kimball Laundry Co. v. United States*, 338 U.S. 1, 69 S.Ct. 1434, 93 L.Ed. 1765 (1949).

informed seller.[2] The question then becomes: *"What has the owner lost?"* [3]

The fundamental premise underlying valuation law is this inquiry. Thus, in fixing just compensation in a condemnation case, one should look to the harm inflicted on the aggrieved owner.

Petitioner, in this case, has lost the fair market value of its land. The trial court should have taken action to address the wrong of tainting the eminent domain proceedings over which he was presiding. An instruction to disregard farmland prices is a remedial possibility.

IV.
DUE PROCESS

Universally, zoning actions intended by local officials to depress the value of land in anticipation of condemnation have been ruled invalid. Such actions violate constitutional prohibitions against deprivation of private property without due process of law and against the taking of private property for public use without just compensation. These type of freezing laws have been held to be arbitrary, unreasonable and confiscatory. See *Robertson v. Salem*, 191 F.Supp 604 (1961,

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2 This classic formulation of the rule may be found in the widely followed decision of the California Supreme Court in *Sacramento & S.R.R. v. Heilbron*, 156 Cal. 408, 104 Pac. 979 (1909).

3 See *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 305 S.Ct. 459, 54 L.Ed. 725 (1910).

DC Oregon); *Symonds v. Bucklin*, 197 F.Supp 682 (1961 DC Md); *Urbanizadora Versalles, Inc. v. Miguel A. Rivera Rios et al*, 701 F.2d 993 (1993, USCA, 1st Cir.).

Official map cases are a classic example. These reserve future right-of-ways for expressways and other public improvements and sometimes provide that use of lands in the path of future construction work will be reserved for condemnation. This was the type of conduct seen in the subject case in Tulsa by Petitioner and which was, after extensive examination, stricken as invalid in *Urbanizadora*, supra, by Circuit Judge Levin H. Campbell who, in discussing a Puerto Rico freezing statute said: "It is well settled that the zoning authority cannot be used to depress the value of land so as to reduce the expense of a subsequent condemnation." *Peacock v. City of Sacramento*, 271 Cal.App.2d 845, 77 Cal. Rptr. 391 (1969).

Similar rulings can be found in civil rights litigation. See, for example, *Oberndorf v. City and County of Denver*, 653 F.Supp 304 (USDC, Colorado, 1987) where an injunction was issued to prevent the taking of neighborhood properties supposedly blighted by an urban renewal agency.

Zoning actions by public officials should not be used as a tool to take property for public use without payment of compensation. A case in point is *Kissinger v. City of Los Angeles*, 327 P.2d 10 (Cal. 1958). A California municipality refused to re-zone 12 lots in anticipation of future condemnation for airport expansion. The lots, which were worth $114,000.00 if re-zoned for apartments, had a value of only $48,000.00 when re-zoned for homes by the planning

commission. The rezoning was invalidated by the California Supreme court with this pronouncement:

> "The evidence establishes that to accomplish the enlargement of the airport and the creation of the approach zone the city intends to condemn the subject property. The inference is clear that the purpose of the ordinances was to prevent the improvement of the subject property in order that it might be acquired at a lesser price for airport purposes."

Other decisions in accord are *State ex. rel. Tingley v. Gurda*, 209 Wis. 63, 243 N.W. 317; *and Grand Western R.C. v. City of Detroit*, 326 Mich. 387, 40 N.W.2d 195.

PROPOSITION II

Permitting respondent's expert Mrs. Janice K. Gordon to testify deprived petitioner of due process and equal protection of the laws.

Petitioner also believes the trial court erred in permitting Respondent's Janice K. Gordon to testify-violating the rule of sequestration existing in Oklahoma.

The Oklahoma Court of Appeals suggests the "landowner objected because Gordon's husband had been in the courtroom throughout the trial." This is not correct. Petitioner objected because Gordon's husband actively discussed the case with Mrs. Gordon prior to the time Mrs. Gordon testified and he gave her important information about the testimony of other witnesses including that of Wayne Alberty, City Planner.

Mrs. Gordon became a witness for Respondent, in part, to rebut the testimony of Mr. Alberty. Mrs. Gordon admitted that she and her husband had discussed the testimony of Petitioner's witness Wayne Alberty.

Q All right, your husband is named David Gordon. Is that correct?

A Yes, sir.

Q Has David Gordon been in attendance at these trial proceedings the last three days, according to your knowledge?

A Yes, sir.

Q An how do you happen to know that?

A He called and told me that he was here and told me that's why he was going.

Q All right. How many times has your husband talked to you in the last three days about where he has been?

A I don't know that I could say a number. I don't know.

Q More than once?

A Yes.

Q All right. Has he told you that he has been in this particular trial, observing the trial proceedings, more than one?

A Yes.

Q All right. More than twice maybe?

A Well, I guess if he's been here three days.

Q Okay. He stays in contact with you rather regularly, I assume?

A Probably twice a day.

Q All right. And you stay in touch with him likewise?

A When he calls. I can't call him.

(Trial Transcript pg. 523, 524.) A-34–A-35.

Mrs. Gordon admitted she and her husband had discussed the testimony of Petitioner's witness Wayne Alberty:

Q Okay. And what did that [Mr. Alberty's plan for commercial development of landowners' 28 acres] mean to you?

A I had looked at that to see if there was anything to equate it in the marketplace.

Q And that's really the reason you had been hired in this case, to make that kind of determination, isn't that right?

A To determine the land use of the property, yes, sir.

Q And, specifically, to determine whether Mr. Alberty's plan is feasible in the marketplace.

A I don't think that's quite a true statement because...

Q Is it partially true?

A Well, I will put it this way. My assignment was to look at the land uses before I ever knew of Mr. Alberty or his plan.

Q But at some point you did know about Mr. Alberty's plan, didn't you?

A Yes, sir.

Q And it was specifically given to you for determination of the question of whether Mr. Alberty's plan was feasible in the current marketplace. Isn't that right?

A Yes, sir.

(Trial Transcript pg. 531.) A-35–A-36.

The trial court impermissibly allowed the violation of the rule of sequestration because permitting a witness to testify when the rule has been invoked and later broken, directly or through an intermediary, violates the rule.

The so-called rule of sequestration, or exclusion of witnesses, had been a tradition of the law in Oklahoma long before it was made a matter of statute in 1978, *12 O.S. 2615*.

Traditionally, the Supreme Court of Oklahoma has held that the enforcement of the rule was discretionary with the trial court and that the trial court's failure to enforce the rule or to permit it to be violated, once it was invoked, would not be disturbed on appeal unless the trial court abused its discretion.

The codified law enacted in 1978 and amended in 1988 reads as follows:

12 O.S. 6155. **Exclusion of Witnesses**

"At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses. The court may make the order or its own motion. This rule does not authorize exclusion of:

1. A party who is a natural person;

2. An officer or employee of a party which is not a natural person designated as its representative by its attorney; or

3. The victim of an alleged criminal offense or a representative of said victim, in any criminal prosecution, upon the motion of the state to bar such exclusion, unless the court finds such exclusion to be in the interest of justice." (Emphasis added by underscoring.)

Petitioner submits that the word "shall" in "the court shall order witnesses excluded" takes away the discretion the trial court had before the statute was enacted, except with respect to the three enumerated exceptions, none of which was present in this case.

Indeed, "shall" connotes a mandatory duty.

Petitioner submits that, in light of the codification of the rule of sequestration, which codification requires that "the court shall order witnesses excluded," the trial court did not have the discretion to ignore the rule. Petitioner respectfully urges the trial court should not have permitted Mrs. Gordon to testify, a violation of substantive due process.

The witness Jan Gordon was an important witness for Respondent in this action. She testified that Wayne Alberty, Petitioner's witness on the issue of highest and best use, was wrong when he concluded that commercial use of the 28 acres was its most appropriate use.

She should not have been told this was Mr. Alberty's evidence by her husband the night before she took the witness

stand. The inference is clear that the purpose for which Respondent employed Mr. David Gordon was not only to assist Respondent's counsel at trial but to assist his wife in preparing her testimony.

CONSTITUTIONAL ISSUES WERE RAISED IN OKLAHOMA COURTS

Petitioner has consistently maintained that violations of due process, equal protection and Fifth Amendment guarantees, as well as other objections exist herein. Petitioner first objected to the manner that these proceedings were conducted shortly after this action was filed by written objection in the trial court. This is reproduced in the Appendix A-26–A-28. All subsequent pleadings, documents and briefs have alleged constitutional infirmity including the Petition-in-Error filed with the Oklahoma Supreme Court in 1992 A-6–A-18. The Oklahoma Court of Appeals acknowledged and specifically discussed the constitutional issues raised by Petitioner albeit rejecting Petitioner's claims in the Court's Opinion A-2–A-5. This statement is made pursuant to *Supreme Court Rule No. 14(h).*

CONCLUSION

Petitioner, D-LANDCO, has not received adequate, fair and "just compensation" for its 28 acres of urban land taken by eminent domain for the Mingo Valley Expressway by Respondent STATE OF OKLAHOMA, ex rel., DEPARTMENT OF TRANSPORTATION ("ODOT"). Certiorari should be granted in order to review the opinion of the Oklahoma Court of Appeals, Division III which rejected

this view and the decision of the Oklahoma Supreme Court to deny review thereof.

Respondent bought the property at a bargain basement price after it and the City of Tulsa rendered the property economically valueless. Petitioner believes these concerted actions were neither fair nor in accord with requirements of due process of state and federal constitutions. Nor is this an award of fair compensation.

Zoning actions by public officials should not be used to take private property for public use without payment of just compensation. When a de facto taking has occurred the depressed prices are a clear violation of constitutional principles.

Petitioner believes a new trial to redress these wrongs should be granted in this case and its Petition for Certiorari be granted.

Respectfully submitted,

LOUIS LEVY, INC.

By: _____

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Attorney for Petitioner
D-LANDCO, INC. and BARBARA LASH

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Tuesday, April 19, 1994

FILED
SUPREME COURT
STATE OF OKLAHOMA
APR 19 1994
JAMES W. PATTERSON
CLERK

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

* * *

79,427 State of Oklahoma ex rel. Department of Transportation v. D-Landco, Inc., an Oklahoma corporation et al.

Certiorari denied.

CONCUR: Hodges, C.J., Lavender, V.C.J., Simms, Hargrave, Wilson, Summers, Watt, JJ.

DISSENT: Opala, Kauger, JJ.

S/S Ralph B. Hodges
CHIEF JUSTICE

NOT FOR PUBLICATION
IN THE COURT OF APPEALS OF
THE STATE OF OKLAHOMA
DIVISION NO. III

Case No. 79,427

FILED
COURT OF APPEALS
STATE OF OKLAHOMA
DEC 28 1993
JAMES W. PATTERSON
CLERK

STATE OF OKLAHOMA, ex rel.
DEPARTMENT OF TRANSPORTATION,
Appellee,
vs.
D-LANDCO, INC., an Oklahoma Corporation; **BARBARA LASH;** and **THE TULSA COUNTY TREASURER,**
Appellants.

APPEAL FROM THE DISTRICT COURT
OF TULSA COUNTY, OKLAHOMA
HONORABLE RONALD L. SHAFFER, JUDGE

AFFIRMED

Louis Levy,
Tulsa, Oklahoma, For Appellants,

Stephen P. Gray,
Tulsa, Oklahoma, For Appellee.

OPINION

Opinion by Stewart M. Hunter, Presiding Judge:

On February 23, 1990, the State of Oklahoma filed this action on behalf of the Department of Transportation,

(ODOT), seeking condemnation of 28 acres of a 139 acre tract of land in Tulsa County needed for construction of the Mingo Valley Expressway. D-Landco, Inc., (Landowner), was the owner of the tract of land.

Two court-appointed commissioners valued the 28 acres at $1,200,000. The third commissioner valued the property at $605,620 in a minority report. Both parties demanded a jury trial.

At trial, Landowner attempted to show that the value of the 28 acre tract of land in question was adversely affected by the failure of the Tulsa Metropolitan Area Planning Commission, (TMAPC) to upgrade the zoning of the land. Five years before this condemnation action was filed, Landowner had applied to the TMAPC for rezoning of the entire 139 acres from AG, denoting land used for agricultural purposes, to CO or "corridor zoning," which is limited to land adjacent to existing or planned freeways. The TMAPC granted the application for CO zoning for all of Landowner's land except the 28 acres upon which a portion of the proposed Mingo Valley Expressway would actually lie. Landowner neither contested the action of the TMAPC nor sought another zoning classification for the 28 acres.

Landowner presented witnesses who testified that the value of the 28 acres was lower because of the AG zoning. Landowner also presented witnesses who testified that the TMAPC had a policy of denying applications for changes in zoning on lands designated for future public use. These witnesses testified that the purpose behind the policy was to save public monies.

ODOT presented a witness who testified that "corridor zoning" is available only for land adjacent to an existing or planned freeway. In other words, land, such as the 28-acre tract in question, upon which an expressway is to built, is not in a "corridor district" and would not be eligible for corridor zoning.

ODOT also called Janice K. Gordon, an appraiser, who testified about the value of the land. Landowner objected because Gordon's husband had been in the court room throughout the trial. According to Landowner, allowing Gordon to testified violated the rule of sequestration previously invoked by the District Court. The District Court held an in camera examination of Gordon, and she testified that nothing she had discussed with her husband would affect her testimony.

At the conclusion of the four-day trial, the District Court entered judgment on a jury verdict valuing the land at $708,220.

On appeal, the Landowner argues: (1) its due process rights to a fair trial were violated by TMAPC's refusal to grant the application for rezoning of the 28 acres; and (2) the District Court erred in allowing the testimony of Gordon in violation of the rule of sequestration.

STANDARD OF REVIEW

We exercise independent judgment both on questions of law and interpretation of facts when reviewing assertions of violations of constitutional rights. *Ranola Oil Co. v. Corporation Commission*, 752 P.2d 1116, 1118 (Okla. 1988).

We review alleged violations of the sequestration rule for abuse of discretion. *See Clark v. Continental Tank Co.*, 744 P.2d 949, 950-953 (Okla. 1987).

FINDINGS ON REVIEW

Landowner complains that its constitutional rights have been violated by the actions of the TMAPC, which is not a party to this case. Landowner was not, however, denied due process; rather, it failed to use the process available to it. By failing to appeal the zoning decision of the TMAPC, Landowner has long since waived any right to review the TMAPC's zoning decision. Therefore, this issue is not properly before this Court. *See Patterson v. Stanolind Oil & Gas Co.*, 77 P.2d 83, 95 (Okla. 1938) (due process issue not properly before court where no appeal taken from order complained of).

The record does not support the alleged abuse of discretion in allowing the testimony of Janice Gordon. The District Court's examination of Gordon supports its decision to allow her testimony.

For these reasons, the judgment of the District Court is AFFIRMED.

BAILEY, J. and GARRETT, J. concur.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

DISTRICT COURT
FILED
APR 13 1992
Don E. Austin, Court Clerk
State of Okla. Tulsa, County

FILED
SUPREME COURT
STATE OF OKLAHOMA
APR 13 1992
JAMES W. PATTERSON
CLERK

Supreme Court Case No. 79427
Tulsa District Court Case No. CJ-90-0958

STATE OF OKLAHOMA, ex rel.,
DEPARTMENT OF TRANSPORTATION,
Appellee,

vs.

D-LANCO, an Oklahoma Corporation;
BARBARA LASH; and the
TULSA COUNTY TREASURER,
Appellant

PETITION IN ERROR (AND PRELIMINARY STATEMENT)

__X__ PETITION IN ERROR ___ CROSS-PETITION

____ AMENDED PETITION ___ COUNTER-PETITION

If the petition is an amended petition state purpose of amendment. N/A

If the petition is a cross-petition or counter-petition state the date that the original petition in error in the appeal was filed with the Clerk of this Court. N/A

Type of Case in Supreme Court:

__X__ Judgment or Final Order of District Court (Rule 1.10)
____ Corp. Commission (oil & Gas) (Rule 1.85)

_____ Corp. Commission (Utility) (Rule 1.85)
_____ Insurance Dept. (Rule 1.55)
_____ Tax Commission (Rule 1.125)
_____ Court of Tax Review (Rule 1.140)
_____ Banking Board or Commissioner (Rule 1.155)
_____ Other (Explain) _____

_____

A. TRIAL COURT HISTORY

COURT/TRIBUNAL: **DISTRICT COURT**
COUNTY: **TULSA**
CASE NO.: **CJ-90-0958**
JUDGE: **HONORABLE RONALD SHAFFER**

ALL QUESTIONS MUST BE ANSWERED
(Insert N/A in the blanks provided if the particular, question is not applicable to the appeal).

DATE OF JUDGMENT OR ORDERED APPEALED PRONOUNCED:

March 12, 1992

(Date may or may not be date of instrument)

DATE THE JUDGMENT OR ORDER WAS FILED

Has not yet been filed.

(Date instrument was filed)

Amended Petition-in-Error will be filed when available (within thirty [30] days) Tulsa District Court Minute (Certified) attached as temporary substitute reference to jury verdict.

WAS APPELLANT OR APPELLANT'S ATTORNEY PRESENT WHEN THE JUDGMENT OR ORDER WAS PRONOUNCED? __X__ YES ____NO

WAS A PARTY OR CLERK DIRECTED TO MAIL A COPY OF THE JUDGMENT OR ORDER TO THE APPELLANT? ____YES __X__NO

IF MAILING A COPY OF THE JUDGMENT OR ORDER WAS DIRECTED DOES THE TRIAL COURT RECORD SHOW THAT THE JUDGMENT OR ORDER WAS MAILED TO THE APPELLANT WITHIN FIVE (5) DAYS OF THE DATE THE JUDGMENT OR ORDER WAS FILED? ___ YES ___NO

IF MAILING WAS ORDERED, ON WHAT DATE WAS THE ORDER MAILED TO THE APPELLANT?

BY DISTRICT CLERK N/A

BY OTHER PARTIES:

Date mailed	Name of party who mailed the order.
1. N/A	N/A
2. _____	_____
3. _____	_____

List all parties who mailed a copy of the order or judgment to the appellant and the dates mailed by each of those parties as reflected by the proof of service filed with the District Court Clerk.

POST-TRIAL MOTION? No.

Type and Authority	Dated Filed in Trial Court
1. N/A	N/A
2. _____	_____
3. _____	_____

DATE OF DISPOSITION OF POST-TRIAL MOTION OR MOTIONS

Type	Date Disposed in Trial Court
1. N/A	N/A
2. _____	_____
3. _____	_____

B. DISPOSITION IN TRIAL COURT OR TRIBUNAL

NATURE OF JUDGMENT OR ORDER APPELLANT SEEKS TO REVERSE:

Jury verdict.

RELIEF SOUGHT BY APPELLANT:

Reversal and remand for new trial.

RELIEF GRANTED BY TRIAL COURT OR TRIBUNAL:

Money judgment in favor of defendant/appellant D-LANDCO (landowner) for $708,220.00.

RELIEF SOUGHT BY APPELLEE:

Affirmation.

JUDGMENT ON LESS THAN ALL CLAIMS OR PARTIES:

DID THE TRIAL COURT ADJUDICATE LESS THAN ALL OF THE CLAIMS OR PARTIES PRESENTED?

____YES _X_NO

IF SO DID THE TRIAL COURT MAKE AN EXPRESS DETERMINATION THAT LESS THAN ALL OF THE CLAIMS OR PARTIES PRESENTED SHOULD BE DECIDED AND EXPRESSLY DIRECT THE FILING OF A FINAL JUDGMENT? ____YES _X_NO

EXHIBIT "A"

Amended Petition-in-Error will be filed when available (within thirty [30] days) Tulsa District Court Minute (Certified) attached as temporary substitute reference to jury verdict.

C. SUMMARY OF CASE

Exhibit "B" attached: Please see attachment

D. ISSUES AND ERRORS PROPOSED TO BE RAISED ON APPEAL

State with specificity each point of law urged as error:

1. Rusty Richardson, Appellee ODOT's appraiser, testifying about $7,500.00 per acre sale price in 1981 (9 years before condemnation of land) of Tulsa Junior College land, after a motion in limine on sales "too remote in time" had been sustained and not in response to any question.
2. Rusty Richardson, Appellee ODOT's appraiser, testifying to property which was a voluntary utterance sales that were not listed in his appraisal report or provided to opposing counsel before trial but intentionally withheld from Appellant.
3. The Appellant landowners were not allowed to show its house being razed or problems created by construction in front of property which goes to the issue of "loss of access" damages for the house. Defendant did not receive "loss of access" damages as a result of the exclusion of the photos and testimony.
4. Jan Gordon, ODOT appraiser, and her husband, also an ODOT appraiser in another case, violated the rule of sequestration and she was allowed to testify after

the judge overruled an objection by Appellant's counsel.

5. Jan Gordon, ODOT witness, violated the hearsay rule when she testified that the basis of her "highest and best use" opinion was information given to her from other people who were not in the courtroom and were not subject to cross-examination.

6. A Motion in Limine to preclude Appellee's use of the Tandem/Chognard sale was overruled. This was not an "arms-length" transaction and should not have been allowed as a comparable sale to be used by Mr. Rusty Richardson.

7. The verdict resulted from Appellant's property being put in a "deep freeze" by zoning actions of the City of Tulsa working in conjunction. with Appellee (ODOT) to place a "No-Building" moratorium on Appellant's (D-Landco) property.

8. Appellant was denied due process and equal protection in violation of the Oklahoma and United States Constitutions by the TMAPC staff working in conjunction with ODOT. They placed Appellant's land in an agricultural (AG) zoning category so that it could not be productively used during interim and reserved it for condemnation at a lower than market price.

9. The jury disregarded the "highest and best use" instruction given by the Court and valued the Appellant's land at agricultural (AG) single or family homesite—not commercial industrial values.

10. The $708,220.00 verdict does not reflect the "highest and best" use of Appellant's property without government interference.

11. Appellant/D-Landco did not receive just compensation as mandated by the provisions of *Art. II, Section 24 of the Oklahoma Constitution* and *Art. V, of the United States Constitution.*

12. The cumulative effect of all the errors was to deny Appellant/D-Landco a fair trial, due process and equal protection of the laws under both the Unites States Constitution and the Oklahoma Constitution.

ANY RELATED OR PRIOR APPEALS:

___ YES NO _X_

If so, identify by style, citation if any, and Supreme Court Number. N/A

Style	Number	Citation

Court Reporters' estimate of number of transcribed pages: 960

CHECK THE APPLICABLE ISSUES INVOLVED IN THE APPEAL:

___ 01	Administrative Law and Procedure
___ 02	Appeal and Error
___ 03	Attorneys
___ 04	Bankruptcy
___ 05	Banks and Banking
___ 06	Bond Forfeitures
___ 07	U.C.C.
_X_ 08	Constitutional
___ 09	Contracts
___ 10	Corporation Commission
___ 11	Corporations & Partnerships
___ 12	Courts
_X_ 13	Damages

___ 14	Estates, Trusts, and Guardianships
___ 15	Family Law
___ 16	Insurance
___ 17	Labor Law
___ 18	Manufacturer's & products Liability
___ 19	Oil & Gas Law
X 20	Procedure
X 21	Property Law
___ 22	Schools & School Districts
___ 23	Taxation
___ 24	Torts
___ 25	(No number 25)
___ 26	Water Law
___ 27	Government
___ 28	42. U.S.C. § 1983
___ 29	Jurisdiction & Venue
___ 30	Elections/Initiative Petitions
___ 31	Prisoners
___ 32	Arbitration
___ 33	Securities
___ 34	Consumer Law
___ 35	Patents & Trademarks
___ 36	Indian Law
___ 37	Municipal Law
___ 38	Governmental Tort Claims Act
___ 39	Garnishment & Execution
___ 40	Discovery
___ 41	Licenses
X 42	Evidence
___ 43	Guaranty & Suretyships
___ 44	Liens, Mortgages & Notes
___ 45	Interest

List by general topic as set forth above any other issues involved in this appeal:

Eminent Domain

E. ALL APPELLANTS MUST SHOW HOW THE APPEAL IS TIMELY BROUGHT

Place an "X" in the appropriate category the appellant is relying on to show a timely appeal.

I. JUDGMENTS AND FINAL ORDERS OF THE DISTRICT COURT

THE APPEAL FROM THE JUDGMENT OR FINAL ORDER HEREIN IS TIMELY BROUGHT BECAUSE:

1. THE PETITION IN ERROR WAS DELIVERED TO THE CLERK OF THE SUPREME COURT WITHIN THIRTY DAYS OF THE DATE THE JUDGMENT OR FINAL ORDER WAS:

____X____A. FILED WITH THE DISTRICT COURT CLERK, OR

_____B. MAILED TO THE APPELLANT BY THE DISTRICT COURT CLERK OR ANOTHER PARTY AND THE COURT RECORDS DO NOT REFLECT THE MAILING OF A COPY OF THE JUDGMENT WITHIN FIVE DAYS OF ITS FILING, OR

2. THE PETITION IN ERROR WAS MAILED TO THE CLERK OF THE SUPREME COURT BY U.S. CERTIFIED MAIL, RETURN RECEIPT REQUESTED, ON _____(date mailed), AND

THE STATED DATE OF MAILING WAS WITHIN THIRTY DAYS OF:

_____A. THE DATE THE JUDGMENT WAS FILED WITH THE DISTRICT COURT CLERK OR

_____B. THE DATE THE JUDGMENT WAS MAILED TO THE APPELLANT BY THE DISTRICT COURT CLERK OR ANOTHER PARTY AND THE COURT RECORDS DO NOT REFLECT THE MAILING OF A COPY OF THE JUDGMENT WITHIN FIVE DAYS OF ITS FILING, OR

II. FINAL ORDERS OF OTHER TRIBUNALS

THE APPEAL HEREIN IS FROM A FINAL ORDER OF A TRIBUNAL: N/A

THE APPEAL HEREIN IS TIMELY BROUGHT BECAUSE:

N/A A. THE SPECIFIC STATUTORY AUTHORITY FOR THE APPEAL PROVIDES THAT THE PETITION IS ERROR SHALL BE FILED IN THE SUPREME COURT WITHIN THIRTY DAYS OF THE DATE THE ORDER WAS RENDERED OR PRONOUNCED AND THE PETITION IN ERROR WAS:

N/A 1. Mailed to the Clerk of the Supreme Court by U.S. Certified Mail, return receipt requested, on

_____

N/A 2. Delivered to the Office of the Clerk of the Supreme Court for filing within thirty days of the date the order was rendered or pronounced. OR

N/A B. THE SPECIFIC STATUTORY AUTHORITY FOR THE APPEAL PROVIDES THAT THE PETITION IN ERROR SHALL BE FILED IN THE SUPREME COURT WITHIN THIRTY DAYS OF THE DATE THE ORDER WAS MAILED TO THE APPELLANT AND THE PETITION IN ERROR WAS:

N/A 1. Mailed to the Clerk of the Supreme Court by U.S. Certified Mail, return receipt requested, on AND The stated date of mailing was within thirty days of the date the order was mailed to the appellant. OR

N/A 2. Delivered to the Office of the Clerk of the Supreme Court for filing within THIRTY days of the date the order was mailed to the appellant. OR

N/A C. _____

_____

F. IS APPELLANT WILLING TO PARTICIPATE IN AN ATTEMPTED SETTLEMENT OF THE APPEAL BY PREDECISIONAL CONFERENCE UNDER COURT OF APPEALS RULE 3.7 IF OFFERED THE OPPORTUNITY?

X YES NO___

G. IS APPELLANT AGREEABLE TO ACCELERATE PROCEDURES FOR THIS APPEAL UNDER COURT RULE?

____YES NO X

(Fast Track)
Exhibit "D" Attached:

H. NAME OF COUNSEL

ATTORNEY FOR APPELLANT:

LOUIS LEVY
5314 South Yale,
Suite 310
Tulsa, Oklahoma 74135-6246
(918) 496-9258

ATTORNEY FOR APPELLEE:

STEPHEN GRAY
PICKARD, MILLER & GRAY
4870 S. Lewis
Suite 200
Tulsa, Oklahoma 74105
(918) 747-9797

MARK CAYWOOD
CATHY HOOD
State of Oklahoma
Dept. of Transportation
200 N.E. 21st Street
Oklahoma City, OK 73105
(405) 521-2681

I. DATED April 11, 1992 Verified by:

Respectfully submitted,

By: S/S Louis Levy
LOUIS LEVY, OBA 5396
5314 South Yale, Suite 310
Tulsa, Oklahoma 74135-6246
(918) 496-9258

Attorney for Appellant
D-LANDCO

J. AFFIDAVIT OF MAILING TO APPELLEE AND DISTRICT COURT CLERK ON DAY OF FILING IN SUPREME COURT

I, LOUIS LEVY, hereby certify that a true and correct copy of the above and foregoing Petition in Error was mailed this 13 day of April, 1992 to STEPHEN GRAY, MARK CAYWOOD and CATHY HOOD, by depositing it in the U.S. Mails, postage prepaid.

I further certify that a copy of the above and foregoing Petition in Error was filed in the office of the Court Clerk of Tulsa County on the 13 day of 1992.

S/S Louis Levy
LOUIS LEVY

SUMMARY OF CASE Exhibit "B"

This is a condemnation case involving the taking of property for a portion of the Mingo Valley Expressway in the City of Tulsa by the Appellee, Oklahoma Department of Transportation (ODOT). The Trial Court action was brought pursuant to *Art. II, Section 24 of the Oklahoma Constitution;* and *Title 69 O S. §1208* relating to eminent domain.

Appellee condemned fee simple title to 28.09 acres of land; a house; a temporary construction easement; and street access rights. The Mingo Valley Expressway is a project of the State of Oklahoma at the point where Appellant/D-Landco's property is located. Appellant/D-Landco, Inc. is a family corporation in which title to the subject property is held. Mr. Bill Armstrong, his son and daughters are owners of all shares of capital stock of the corporation. The subject property has been owned by Mr. Armstrong since 1971.

This is a "partial" taking of property. The 28.09 acres was a part of a larger tract owned by Appellant/D-Landco, Inc. in 1990 of 139 acres. Approximately 112 acres remains owned by D-Landco. Inc.

This action was filed on February 23, 1990. Commissioners were appointed and report made assessing damages resulting from the condemnation taking at $1,200,000.00. Both parties filed a demand for Jury trial. Trial occurred from March 9-12, 1992 and nine members of a Tulsa County jury returned a verdict of $708,220.00 in favor of the Appellant landowner.

This jury verdict and judgment rendered thereon is appealed by Appellant/D-Landco, Inc. (Landowner).

IN THE DISTRICT COURT FOR TULSA COUNTY,

STATE OF OKLAHOMA.

Case No. CJ-90-0958

THE STATE OF OKLAHOMA, ex rel.

Department of Transportation,

Plaintiff,

vs.

D-LANDCO, an Oklahoma corporation,

and **BARBARA LASH,**

Defendants.

VERDICT FORM

We, the jury impaneled and sworn in the above-entitled cause, do, upon our oaths, find the issues for the defendants and fix recovery at $ 708,220.

1. Britt Watson
2. Debra K. Field
3. Calvin T. Langston
4. Patsy Baker
5. Melvin W. Kay
6. Shawnna Jones
7. Edward R. Rudkin
8. Michael Eugene Mayo
9. William C. Gray
10. _____
11. _____
12. _____

Jurors concurring.

Foreman Britt Watson

CLERK OF THE DISTRICT COURT
TULSA COUNTY OKLAHOMA

DAILY MINUTES FOR DATES: 03/12/92 TO 03/12/92

****

MINUTES ENTERED BY: BARBARA B. HEINEN

CASE NUMBER	PLAINTIFF	DEFENDANT
CJ-90-000958-01	State of Oklahoma	D Landco Inc.

BBH 03/12/92 5971 Real Property — State
XJT Shaffer Ronald: Jury Trial of 3-9-92, 3-12-92.....

Case called for Jury Trial. Both sides present in open court and announce ready for trial. Plaintiff present and represented by Stephen Gray. Defendant present and represented by Louis Levy.

The jurors are called and sworn to qualifications. the jury is IMPANELLED AND EXAMINED FOR CAUSE. THE following juror is excused for cause Judy Lane. The jurors are accepted for cause.

PEREMPTORY CHALLENGES

PLAINTIFF: Dartanier Patton, Jamie Hinnen, Bryan McIntosh.

DEFENDANT: Aaron Johnson. Regina Partman. Amy Smith.

The following jurors are accepted and sworn to try the cause:

Knox Oglee. Edward Reed. Melanie Ray. Michael May. Patsy Baker. Alfred Marietta. Valerie Thompson, Debra Briscoe-Field. William Bayman. Shawnna Jones. William Usry. Britt Wasson.

Opening statements are made. 13 witnesses sworn. Rule was invoked.

BBH 03/12/92 5971 Real Property — State
XCONT (Continuation of above minute).....

REPORTER Kathie Schiermeister. Defendant present evidence and rests. Plaintiff presents evidence and rests. Both sides rest. The jury is instructed as to the law. Closing arguments are made.

DISTRICT COURT
FILED
APR 10 1992
DON E. AUSTIN,
COURT CLERK
STATE OF OKLA. TULSA, COUNTY

CLERK OF THE DISTRICT COURT
TULSA COUNTY OKLAHOMA

DAILY MINUTES FOR DATES: 03/12/92 TO 03/12/92

****

CJ-90-000958-01

MINUTES ENTERED BY: BARBARA B. HEINEN

The swearing of the Bailiff is waived and at 2:44 P.M. the jury retires for deliberation in custody of the Bailiff. At 4:53 P.M., jury returns into open court with their verdict, which is read in open court, ordered recorded and filed, and it, to wit: "We the jury impaneled and sworn in the above entitled cause do upon our oaths find the issues for the deft and fix recovery at $708,220. Jurors concurring, signed Britt Wasson Foreman." Jury discharged. Witnesses sworn: Michael D. Case, Robert Mellott, Robert Parmelee, William Dale Armstrong, Expert Witnesses: Wayne Alberty, Ned Schmidt, Dale Keele, Jack Spradling, Christine Lietzke, Michael L. Buchert, Robert F. Gardner, Jan Gordon, Rusty Richardson.

DISTRICT COURT
FILED
APR 10 1992
DON E. AUSTIN, COURT CLERK
STATE OF OKLA. TULSA, COUNTY

IN THE DISTRICT COURT OF TULSA COUNTY
STATE OF OKLAHOMA

Case No. CJ 90-0958

DISTRICT COURT
F I L E D
APR 01 1992
DON E. AUSTIN, COURT CLERK
STATE OF OKLA. TULSA,
COUNTY

THE STATE OF OKLAHOMA, ex rel.
DEPARTMENT OF TRANSPORTATION;

Plaintiff,

vs.

D-LANDCO INC., an Oklahoma corporation; **BARBARA LASH;** and **THE TULSA COUNTY TEASER,**

Defendants.

ORDER

COMES NOW the District Court and being fully advised of the premises finds as follows:

1. The plaintiff, the State of Oklahoma ex rel. Department of Transportation instituted a lawsuit in eminent domain to acquire part of the defendant's property.

2. Commissioners were appointed and the Commissioners returned a Report of Commissioners of $1,200,000.00 on June 8 1990. ODOT deposited said money into court.

3. A jury trial was had in this matter from March 9-12, 1992 and a jury verdict was returned in the sum of $708,220.00.

NOW THEREFORE, being fully advised of the premises, the court hereby orders the defendant, D-Landco Corporation, to pay to the State of Oklahoma ex rel. Department of Transportation the difference between the commissioners' award and the jury verdict in the sum of $491,780.00.

S/S Ronald L. Shaffer
Judge of the District Court

IN THE DISTRICT COURT OF TULSA COUNTY
STATE OF OKLAHOMA

Case No. CJ-90-0958

DISTRICT COURT
FILED
MAY 31 1990
DON E. AUSTIN, COURT CLERK
STATE OF OKLA., TULSA, COUNTY

STATE OF OKLAHOMA, ex rel.
Department of Transportation,

Plaintiff,

vs.

D-LANDCO., an Oklahoma Corporation;
BARBARA LASH; and,
THE TULSA COUNTY TREASURER,

Defendants.

OBJECTION AND EXCEPTION TO REPORT OF COMMISSIONERS

COME NOW the Defendants, **D-LANDCO**., an Oklahoma Corporation; **BARBARA LASH,** and object to the Report of Commissioners filed herein on May 25, 1990 and take the following exceptions to said Report as follows:

1. The Report of Commissioners does not reflect an appraisal of "severance" damages to the land owned by Defendants and by reason thereof said Commissioners have not considered all of the "special" injuries which the Defendants have sustained by reason of the Plaintiff's taking their property.

2. The Report of Commissioners does not reflect an appraisement of land being taken by the Plaintiff for the highest use and benefit of the Plaintiff.

3. The Report of Commissioners does not reflect an itemized appraisement of the injuries which these Defendants will suffer by reason of the "taking" of Defendants property for roadway purposes of this property and for this reason said report is defective.

WHEREFORE, the Defendants, **D-LANDCO**., an Oklahoma Corporation; **BARBARA LASH**, pray for an evidentiary hearing in this case to ascertain all facts relating to the Defendants' property and grant a dismissal of the Petition filed by the Plaintiff or such other equitable relief as the Court may deem proper.

LOUIS LEVY, INC.
By: S/S Louis Levy
5314 South Yale, Suite 310
Tulsa, Oklahoma 74135.
(918) 496-9258

Attorney for Defendants
D-LANDCO and BARBARA LASH

CERTIFICATE OF MAILING

I, LOUIS LEVY, certify that on the 30 day of June, 1990 I mailed a true and correct copy of the above instrument to:

E. H. Purcer
Cathy S. Hood
Staff Attorneys

Department of Transportation
200 N.E. 21st Street
Oklahoma City, Oklahoma 73105

with sufficient prepaid postage to entitle same to due passage in the United States mail.

S/S Louis Levy
LOUIS LEVY

IN THE DISTRICT COURT FOR TULSA COUNTY, STATE OF OKLAHOMA.

Case No. CJ-90-958

DISTRICT COURT
FILED
OCT 01 1992
DON E. AUSTIN, COURT CLERK
STATE OF OKLA. TULSA, COUNTY

THE STATE OF OKLAHOMA, ex rel.
Department of Transportation,

Plaintiff,

vs.

D-LANDCO, an Oklahoma corporation,
and **BARBARA LASH,**

Defendants.

RECORD OF PROCEEDINGS had in the above-entitled cause on March 9, 10, 11, and 12, 1992, before the Honorable Ronald L. Shaffer, Judge of the District Court of Tulsa County, State of Oklahoma, and a jury of twelve.

APPEARANCES:

MR. STEPHEN P. GRAY
2865 East Skelly Drive, Suite 205
Tulsa, Oklahoma
Attorney for the Plaintiff

MR. LOUIS LEVY
5314 South Yale, Suite 310
Tulsa, Oklahoma
Attorney for the Defendants

REPORTED BY:

Kathie Schiermeister, CSR, CP-RPR, CM
Official District Reporter

VOLUME I of III
(pp. 2-227)

DISTRICT COURT OF OKLAHOMA
Official Transcript - Copy

TESTIMONY OF WAYNE ALBERTY, CITY PLANNER:

Q. What was the vote of the planning commission at that time? What action did they take?

A. Their vote was unanimous. It was 8-0.

Q. All right. And in the vote did they exclude the 28 acres?

A. Yes, they did. Did you wish me to read the motion?

Q. Read the staff recommendation that appears in those minutes, if you will, Mr. --

A. Are you asking for the entire staff recommendation or just the part that applies to the exclusion of the right of way?

MR. GRAY: Your Honor, I'm going to object. I think that the minutes and Defendant's Exhibit No. 2 speaks for itself.

THE COURT: I understand. But it might be helpful to read portions of it, counsel.

Q. Do you see the portion of the minutes that is headed "staff recommendation"?

A. Yes, sir, I do. There is a conclusion in the minutes and that's only a paragraph if you'd like for me to read that. It's only a short statement.

Q. All right, would you please read that to the jury.

A. Okay, this is the staff recommendation that's recorded in the minutes of the Tulsa Metropolitan Area Planning Commission on June 12th, 1985. "Conclusion: Similar to the zoning on the south half of this section, the staff can support CO zoning on the subject tract, less and except that portion located in the proposed Mingo Valley Freeway, which should remain AG."

Q. All right. Was the vote of the planning commission consistent with that?

A. Yes, it was.

Q. Read the vote of the planning commission for us, please, on the next page.

A. "TMAPC action: Eight members present. On the motion of Young, the planning commission voted 8-0, with Carnes, Connery, Draughon, Harris, Kempe, Wilson, Woodard, Young, aye. No nays. No abstentions. Higgins, Paddock, VanFossen, absent. To recommend to the board of city commissioners that the following described property be rezoned CO, less and except an AG tract for the purposes of the Mingo Valley Freeway, as recommended by staff."

Q. The planning commission is or is not a recommending body to the city council on planning?

A. Is a recommending body.

Q. Did this recommendation go to the city council?

A. Yes, sir, it went to the city commission at that time in '85.

Q. And did they adopt it?

A. Yes, they did.

Q. And did it become the ordinance that placed zoning on this property?

A. Yes, it did.

Q. Why wasn't the entire 139 acres placed in a CO zoning district as D-Landco requested? If you know.

A. By policy of the staff to recommend exclusion of the portions that's within a proposed right-of-way take.

Q. And what's the purpose of that recommendation of the staff?

A. I think it's a clear-cut purpose to attempt to hold down the value on property. So that when the public agency is ready to purchase it —

MR. GRAY: Your Honor, I have to object to this response as being narrative in this response to the question.

MR. LEVY: He's already testified that's what the code provides.

THE COURT: I'll overrule.

A. It is so stated in the zoning code. It's Provision C under the provisions of the Tulsa Zoning Code, agricultural district provisions.

Q. And that's what happened to the 28 acres of the D-Landco property, isn't it?

A. Yes, that's correct.

Q. And it's stayed AG ever since, hasn't it?

A. That's correct.

TESTIMONY OF BOB PARMELE, CHAIRMAN:

Q. All right, sir. Can you tell the jury what the D-Landco property was zoned in 1985?

A. Agricultural.

Q. That's the 28 acres that's being taken for the expressway?

A. Well, the entire property I think was zoned agricultural prior to the application for zoning.

Q. I see, sir. You're talking about when the application was actually filed.

A. Okay, the entire property was zoned agricultural.

Q. All right, sir. And tell us what you noticed from the proceedings as to how they went about rezoning the property. What happened?

A. The application was for corridor zoning, CO, on the entire tract. As I recall, the staff recommendation was for approval of CO zoning on the tract except for the 28 acres, I believe, that was reserved for future right of way of the Mingo Valley Expressway.

Q. Is there a policy of reserving future expressway for the Mingo Valley Expressway and not rezoning it? At the staff level?

A. I think at the staff level, the policy is not to recommend approval of rezoning in future expressway right of way.

Q. And why does the staff have that policy? If you know.

A. My opinion is that they feel that by reserving that right of way, it changes the value of the property.

Q. Up or down, sir?

A. Downward.

IN CAMERA EXAMINATION OF JAN GORDON

BY MR. LEVY:

Q. Your name is Mrs. Jan Gordon?

A. Yes.

Q. And you're an appraiser?

A. Yes.

Q. And you live and work in Broken Arrow, Oklahoma.

A. Yes, sir.

Q. And you are going to be a witness in the case that is now on trial in Judge Shaffer's court known as ODOT versus D-Landco.

A. Yes, sir.

Q. And you are prepared to testify this afternoon or tomorrow morning in this trial; is that correct?

A. Yes, sir.

Q. You have not previously attended any trial proceedings of this case, have you?

A. No, I haven't been here.

Q. All right. Your husband is named David Gordon. Is that correct?

A. Yes, sir.

Q. Has David Gordon been in attendance at these trial proceedings the last three days, according to your knowledge?

A. Yes, sir.

Q. And how do you happen to know that?

A. He called and told me that he was here and told me that's why he was going.

Q. All right. How many times has your husband talked to you in the last three days about where he has been?

A. I don't know that I could say a number. I don't know.

Q. More than once?

A. Yes.

Q. All right. Has he told you that he has been in this particular trial, observing the trial proceedings, more than once?

A. Yes.

Q. All right. More than twice maybe?

A. Well, I guess if he's been here three days.

Q. Okay. He stays in contact with you rather regularly, I assume?

A. Probably twice a day.

Q. All right. And you stay in touch with him likewise?

A. When he calls. I can't call him.

Q. Okay. And that's how you know that he has been here. Is that right? By the telephone calls.

A. Yes.

Q. All right. Tell us what he has told you about the proceedings. What he has observed and what he has heard.

Q. Okay. And what did that mean to you?

A. I had looked at that to see if there was anything to equate it to in the marketplace.

Q. And that's really the reason you had been hired in this case, to make that kind of determination, isn't that right?

A. To determine the land use of the property, yes, sir.

Q. And, specifically, to determine whether Mr. Alberty's plan is feasible in the marketplace.

A. I don't think that's quite a true statement because —

Q. Is it partially true?

A. Well, I will put it this way. My assignment was to look at the land uses before I ever knew of Mr. Alberty or his plan.

Q. But at some point you did know about Mr. Alberty's plan, didn't you?

A. Yes, sir.

Q. And it was specifically given to you for a determination of the question of whether Mr. Alberty's plan was feasible in the current marketplace. Isn't that right?

A. Yes, sir.

Q. And you're prepared to testify that it's not feasible in the current marketplace?

A. Yes, sir. Q. All right.

MR. LEVY: I don't have any further questions, Your

CERTIFICATE

STATE OF OKLAHOMA)
) SS.
COUNTY OF TULSA)

I, KATHIE SCHIERMEISTER, a Certified Shorthand Reporter in and for the State of Oklahoma, do hereby certify that the foregoing is a true and correct record of my notes

taken in Case No. CJ-90-958, heard on the 9th, 10th, 11th, and 12th days of March 1992.

I further certify that I am not related to nor attorney for either of said parties nor otherwise interested in said action.

WITNESS MY HAND AND SEAL this 14 day of September 1992.

S/S Kathie Schiermeister
Kathie Schiermeister, CSR, CP-RPR, CM
Official District Reporter

Kathie Schiermeister
Oklahoma Certified Shorthand Reporter
Certificate No. 00351

§ 2615. Exclusion of Witnesses

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses. The court may make the order of its own motion. This rule does not authorize exclusion of:

1. A party who is a natural person;

2. An officer or employee of a party which is not a natural person designated as its representative by its attorney;

3. A person whose presence is shown by a party to be essential to the presentation of the party's cause; or

4. The victim of an alleged criminal offense or a representative of said victim, in any criminal prosecution, upon the motion of the state to bar such exclusion, unless the court finds such exclusion to be in the interest of justice.

Laws 1978, c. 285, § 615, eff. Oct. 1,1978. Laws 1988, c. 109, § 1, eff. Nov. 1, 1988; Laws 1991, c. 62, § 5, eff. Sept. 1, 1991.

§ 24. Private property—Public use
Character of use a judicial question

Private property shall not be taken or damaged for public use without just compensation. Such compensation, irrespective of any benefit from any improvements proposed, shall be ascertained by a board of commissioners of not less than three free-holders, in such manner as may be prescribed by law. The commissioners shall not be appointed by any judge or court without reasonable notice having been served upon all parties in interest. The commissioners shall be selected from the regular jury list of names prepared and made as the Legislature shall provide. Any party aggrieved shall have the right of appeal, without bond, and trial by jury in a court of record. Until the compensation shall be paid to the owner, or into court for the owner, the property shall not be disturbed, or the proprietary rights of the owner divested. When possession is taken of property condemned for any public use, the owner shall be entitled to the immediate receipt of the compensation awarded, without prejudice to the right of either party to prosecute further proceedings for the judicial determination of the sufficiency or insufficiency of such compensation. The fee of land taken by common carriers for right of way, without the consent of the owner, shall remain in such owner subject only to the use for which it is taken. In all cases of condemnation of private property for public or private use, the determination of the character of the use shall be a judicial question.

Supreme Court, U.S.
FILED
AUG 17 1994
OFFICE OF THE CLERK

No. 94-118

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

D-LANDCO, an Oklahoma Corporation,
and **BARBARA LASH,**

Petitioner,

vs.

STATE OF OKLAHOMA, ex rel.
DEPARTMENT OF TRANSPORTATION,

Respondent.

RESPONSE BRIEF OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Did Petitioner receive just compensation under Amendment V to the United States Constitution at the condemnation jury trial in 1992 related to the initial rezoning of its property under the City of Tulsa Zoning Code and Comprehensive Plan involving Corridor Districts and Corridor Zoning back in 1985?

2) Did Petitioner receive just compensation at the condemnation jury trial in 1992 on the issue of damages under Amendment V to the United States Constitution after Petitioner failed to pursue any of its available administrative and/or legal remedies on its only rezoning application filed seven (7) years previously in 1985?

3) Is the Petitioner barred by waiver, laches, and estoppel from raising its complaint related to substantive due process under the unique facts of this case?

4) Does the allegation of violation of the rule of sequestration after extensive *in camera* examination of a government "development trends" expert in which the Trial

Court ruled no violation of the Rule of Sequestration foist any justiciable issue upon this Court with regard to just compensation under Amendment V and the Fourteenth Amendment to the United States Constitution?

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No. 94-118

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

D-LANDCO, an Oklahoma Corporation;
and **BARBARA LASH,**
Petitioner,

vs.

STATE OF OKLAHOMA, ex rel.
DEPARTMENT OF TRANSPORTATION,
Respondent,

RESPONSE BRIEF OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI

I. OPINIONS BELOW

This Court is in effect being asked to review the Jury Verdict and Judgment of the District Court of Tulsa County, State of Oklahoma, dated March 12, 1992. Although Petitioner technically seeks certiorari from the Order of the Supreme Court of Oklahoma dated April 19, 1994 denying

Petitioner's request for Writ of Certiorari from the Court of Appeals of the State of Oklahoma, the Oklahoma Supreme Court did nothing more than summarily affirm the Court of Appeals ruling which had affirmed the District Court's ruling. In its unpublished and non-precedential opinion, the Oklahoma Court of Appeals refuted Petitioner's constitutional claims:

> Landowner was not, however, denied due process; rather it failed to use the process available to it. By failing to appeal the zoning decision of the TMAPC, Landowner has long since waived any right to review the TMAPC's zoning decision. Therefore, this issue is not properly before this Court. *See* Patterson v. Stanolind Oil & Gas Co., 77 P.2d 83, 95 (Okla. 1938) (***due process issue not properly before court where no appeal taken from order complained of***) [Emphasis added.]

The record does not support the alleged abuse of discretion in allowing the testimony of Janice Gordon. The District Court's examination of Gordon supports its decision to allow her testimony. Accordingly, Respondent asks this Court to deny Petitioner's Writ of Certiorari.

II. OBJECTION TO JURISDICTION

Respondent objects to this Court assuming jurisdiction based upon Petitioner's untimely failure and delay in exhausting any of its administrative and/or legal remedies related to its initial zoning application in 1985, seven (7) years prior to the condemnation jury trial in 1992. Case law has

held that where a Petitioner had not pursued the remedy afforded by state law for the vindication of any constitutional right it claimed was violated, this Court must dismiss the appeal and deny certiorari pursuant to the holding of *Copperweld Steel Co. v. Industrial Com. of Ohio*, 324 U.S. 780, 89 L.Ed. 1363, 65 S.Ct. 1006 (1945).

STATEMENT OF THE CASE

The Facts

Petitioner's view of the facts can at best be described as a slanted view of the evidence presented at trial. Petitioner knows, or at least should know, that this Court will not grant certiorari to review the evidence or inferences drawn from it. *General Talking Pictures Corp. v. Western Elec. Corp.*, 304 U.S. 175, 178 (1938). As Justice Holmes wrote: "We do not grant a certiorari to review specific facts." *U.S. v. Johnson*, 268 U.S. 220, 227 (1925). Given this standard of review, an appropriate review of the facts is as follows:

A. The evidence demonstrated that Petitioner never preserved its right to appeal the zoning decision of the Tulsa Metropolitan Planning Commission (TMAPC) and the City of Tulsa in 1985.

Petitioner contends that it failed to receive just compensation. This is based on its duplicitous allegation that "state and local officials worked together to restrict its property's uses through zoning laws and thus depress its

value." However, Petitioner omits to fully inform this Court of the circumstances surrounding its 1985 Zoning Application for Corridor Zoning as well as the true nature of Corridor Zoning under the City of Tulsa Zoning Code.

Corridor Zoning is only allowed in Corridor Districts. Said Districts are from the edge of an existing and/or proposed expressway to the next major arterial street under the City of Tulsa Comprehensive Plan and Zoning Codes. [Transcript, Testimony of Wayne Alberty, p. 132.] A-13; [Transcript, Testimony of Robert Gardner, p. 479, p. 482, p. 490.] A-19--A-22. One hundred eleven (111) acres of the Petitioner's 139 acres was contained in what is known as the "Corridor District." The City of Tulsa granted Petitioner's Corridor Zoning request on this 111 acres. The remaining 28 acres was never in the "Corridor District" because it was on the expressway alignment and, hence, the City of Tulsa refused to rezone Petitioner's property to Corridor Zoning. Petitioner never appealed this denial of zoning to the District Court and, thus, never exhausted its available legal and/or administrative remedies in 1985. In addition, Petitioner never sought to obtain any other zoning on the remaining 28 acres zoned AG ("Agricultural Zoning") [Transcript, Testimony of Wayne Alberty, pp. 154-155.] A-14, and it was unrefuted at trial that this could have been done. [Transcript, Testimony of Robert Parmele, p. 198.] A-16. [Transcript, Testimony of Robert Gardner, pp. 490-493.] A-21--A-23. Indeed, the property immediately to the south of Petitioner's 28 acres zoned AG

was in the expressway alignment and was zoned for Residential Single Family ("RS-3"). A-38--A-39. It was also undisputed that had Petitioner asked for this RS-3, it would have been granted. [Transcript, Testimony of Robert F. Gardner, p. 493.] A-23.

B. The City of Tulsa did not attempt to depress market value of Petitioner's land through its zoning action.

Petitioner has accused the City of Tulsa and Oklahoma Department of Transportation ("ODOT") of trying to "freeze" its property based upon the speculations of two of its witnesses, Mr. Alberty and Mr. Parmele, through the zoning decision of the City of Tulsa in 1985. However, Petitioner as usual fails to disclose the whole story with regard to the testimony produced at trial. Mr. Parmele testified he was an expert in real estate appraisal and refuted Petitioner's "freeze theory" on Petitioner's direct examination of him:

> Q. So the value of the property would remain lower if the property remained in an AG Zoning classification.
>
> A. In their mind. ***Not in mine***, but in theirs. [Emphasis added.]
> [Transcript, p. 192] A-14.

This freeze theory dissolves upon a review of Robert Gardner's testimony. Mr. Gardner was the Deputy Director of the Indian Nations Council of Government which provides planning and zoning support to the five member zoning and

planning panel known as the TMAPC. He was the only witness tendered at trial as an expert in the Tulsa Zoning Code, the Comprehensive Plan of Tulsa, the Tulsa Development Guidelines and the Tulsa Zoning Code and Platting Regulations. He refuted Mr. Alberty's testimony as follows:

> Q. Sir, if Mr. Alberty made a statement that it's your intended object or the City's intended object to depress values of property through the zoning process in the path of the Mingo Valley Expressway, or any expressway, do you have an opinion as to the veracity of that statement, sir?
>
> A. That is an incorrect statement. [Trial Transcript, p. 493] A-22.

C. Petitioner's witnesses testified that the property's highest and best use and value was commercial, industrial, and multi-family and had a medium intensity use.

Petitioner complains that governmental actions that allegedly froze the value of its property, yet its witnesses were allowed to totally contradict this "freeze" theory in their testimony on direct examination. Indeed, Mr. Parmele who was Chairman of the TMAPC testified on direct examination:

> Q. All right. I've asked you to take a look at the D-Landco property from a highest and best use standpoint, have I not?

A. Yes, you have.

Q. Do you have an opinion, sir, as the chairman of the planning commission, as to the highest and best use of that property?

A. I have an opinion that the highest and best use will be some type of medium intensity uses.

* * *

Q. All right, sir. What about property adjacent to Tulsa Junior College and 81st Street?

A. Based on the presence of the junior college, I think it would lend itself to a medium intensity development.

Q. All right, sir. So you could put a restaurant there maybe, like the restaurant across the street?

A. That would be possible.

Q. And you might put an office warehouse on that property?

A. It would be possible.
[Transcript, pp. 192-193] A-15--A-16.

Medium intensity development includes restaurants and office warehouses under the City of Tulsa Comprehensive Plan, Development Guidelines and Zoning Code. Further, the area of land Mr. Parmele was testifying about was the 28 acres in the path of the expressway that was zoned AG.

Petitioner's value witnesses did not appraise the 28

acres as AG, but as commercial, industrial, and multi-family. Mr. Keele, Petitioner's appraiser, testified to this on direct examination as follows:

> Q. What sir, in your opinion, is the highest and best use of the D-Landco property?
>
> A. Commercial, industrial, and multi-family.
>
> Q. And what was it on June the 8th of -- 9th of 1990?
>
> A. Commercial, industrial, high density residential.
> [Transcript, p. 247] A-17.

Petitioner's other appraisal witness, Ms. Christine Lietzke, testified on direct examination that all of Petitioner's property had a commercial, not an agricultural. highest and best use as follows:

> Q. What's your opinion as the highest and best use of this piece of property?
>
> A. Commercial.
>
> Q. Would that be true with respect to the 28 acres in the take area?
>
> A. In my opinion before the take, it was all commercial.
> [Transcript, p. 366] A-18--A-19.

In light of its witnesses' testimony concerning a non-agricultural highest and best use, its attempts to foist this freeze theory of an agricultural price upon this Court is without merit.

D. Respondent's witnesses testified to a non-agricultural highest and best use.

The *coup de grace* in this whole specious argument of the freeze theory is that the Respondent's witnesses did not present AG as the highest and best use or value for the Petitioner's property. Ms. Janice K. Gordon was tendered as a market trends and highest and best use expert for development of real estate. She did an exhaustive analysis of property development in this area. She testified as follows:

> Q. Did you draw any conclusion as to a highest and best land use for the D-Landco property based on your survey of this study area?
>
> A. Yes, sir.
>
> Q. And what can you tell the ladies and gentlemen of the jury about that?
>
> A. What this particular thing [exhibit] tells me is that based on the history of land uses there, that the highest and best use for the D-Landco property would be single family residential.
> [Transcript, p. 553] A-24--A-25.

Respondent's value witness was an appraiser named Rusty Richardson. Mr. Richardson testified to a non-agricultural highest and best use and value after reviewing the market:

> Q. What conclusion did you draw from your study of the marketplace with regard to more intense zonings

developing single-family residential, Mr. Richardson?

A. Well, the only true market right now is for single-family. That is the highest and best use in most cases in this vicinity. . . .
[Transcript, p. 610] A-25.

IV. ARGUMENT AND AUTHORITIES

A. Summary of Argument

Simply put, Petitioner asks this Court to grant certiorari because it disagrees with the jury verdict at the District Court level that was affirmed by the Oklahoma Court of Appeals and the Oklahoma Supreme Court.

Petitioner argues that the Respondent and other governmental entities sought to "freeze" its property with an agricultural value in its only zoning request in 1985 (seven years before the trial). It fails to disclose to this Court it never appealed the City of Tulsa's zoning action in 1985, that the City's action was in accordance with duly enacted zoning laws, that Petitioner never sought to rezone its property again, and that it presented substantial amounts of evidence as to a commercial, industrial and multi-family highest and best use and value for its land at trial. The jury chose not to believe Petitioner's evidence.

Petitioner argues that the District Court, Oklahoma Court of Appeals, and the Oklahoma Supreme Court erred in holding there was no alleged abuse of discretion in allowing

the testimony of Respondent's highest and best use witness, Janice Gordon. Petitioner fails to disclose the lengthy *in camera* examination of Ms. Gordon in which the Trial Judge held there was no problem with Ms. Gordon testifying at trial.

PROPOSITION I.

PETITIONER RECEIVED JUST COMPENSATION AT THE CONDEMNATION JURY TRIAL IN 1992.

I. Petitioner's contention it was denied a fair trial due to an administrative zoning decision by the City of Tulsa seven years before trial is without merit.

A. Statute of limitations bars Petitioner's claim.

Petitioner contends it was denied a fair trial due to an administrative zoning decision by the City of Tulsa in 1985, seven years prior to the trial of this matter. It was unrefuted at trial that the Petitioner never contested the City's administrative decision. [Transcript, Testimony of Wayne Alberty, pp. 154-155.] A-14. [Testimony of Robert L. Parmele, Jr., p. 198.] A-16. [Testimony of Robert F. Gardner, p. 490.] A-20--A-21. Surely, the failure of the Petitioner to take any affirmative action on its part to timely contest the City's administrative action in 1985 constitutes a waiver on its part. As more than five years have elapsed since the City's zoning decision, clearly the Petitioner is precluded from asserting such a claim pursuant to the Statute of

Limitations codified in 12 O.S. 1992 §95(7) as follows:

> Civil actions other than for the recovery of real property can only be brought within the following periods after the cause of action shall have accrued and not afterwards; *** (Seventh); an action for relief not herein before provided for can only be brought within five (5) years after the cause of action shall have accrued.

B. The City's administrative zoning action in 1985 was consistent with the Comprehensive Plan and Development Guidelines.

A careful scrutiny of the basis for the City's action in 1985 demonstrates the Petitioner was not denied a fair trial. The City's zoning decision was a lawful exercise of its police powers. The City's denial of Corridor ("CO") zoning of the 28 acres in the path of the expressway was made in accordance with the provisions of the Comprehensive Plan and Development Guidelines of the City of Tulsa. [See Transcript, Testimony of Robert F. Gardner, p. 490.] A-20--A-21. Corridor zoning for the subject 28 acres was not proper since it fails to satisfy the essential requirement for eligibility per the Comprehensive Plan and Development Guidelines. Said requirement is the location outside the expressway alignment and not within the expressway alignment. The Metropolitan Development Guidelines for the City of Tulsa sets forth the Criteria for Corridor (CO) zoning in Corridor Districts at pp. 7, 9 and 10, as follows:

CORRIDORS
Corridors are located ***along*** freeways. . . . [Emphasis added.] A-6.

* * *

CORRIDORS - The criteria, permitted land use and development conditions of the Corridor [District] are as follows: * * *

CRITERIA:

> Land situated ***adjacent to*** existing, programmed (right-of-way acquired) or ***planned*** freeways. . . . No use is permitted as a matter of right in the Corridor Zoning District. [Emphasis added.] A-8.

* * *

DEVELOPMENT CONDITIONS:

> 1. ***Only land situated adjacent to a developed freeway or freeways where the right of way has been acquired (land acquisition program instituted which includes the subject property)*** and which is bounded by arterial streets will be considered for Corridor Zoning. [Emphasis added.] A-11.

The language is clear and unambiguous, providing that

only lands "adjacent to" and not in the path of an expressway are eligible for Corridor ("CO") zoning as these are the areas of the Corridor District. Robert F. Gardner, the Deputy Director of the Indian Nations Council of Governments ("INCOG"), was the only witness tendered at trial as an expert in the Tulsa Zoning Code, Comprehensive Plan, Development Guidelines and the Tulsa Zoning Code and Platting Regulations [Transcript, Testimony of Robert F. Gardner, p. 471.] A-19. He testified about the eligibility of D-Landco's property in the path of the expressway for CO zoning:

Q. Sir, have you reviewed the minutes associated with the zoning of the D-Landco property back in 1985?

A. Yes, I have.

Q. What did they ask for at that time, sir? If you recall.

A. They asked for corridor zoning. The property was zoned for agricultural as I recall.

Q. Okay. It was totally zoned agricultural and they were asking to change it?

A. Yes.

Q. Now, again, can you get corridor zoning under the comprehensive plan in the path of the Mingo Valley Expressway?

A. No, you cannot. It's not consistent with the plan.

Q. Could they have gotten some other type of zoning? Besides corridor zoning?

A. If they'd have asked for it. Anything that should have been appropriate under the yellow. We would grant a single-family had they asked for it.
[Transcript, p. 490.] A-21--A-22.

In the City of Tulsa, an applicant may only obtain CO zoning in a Corridor District. A Corridor District lies outside the Mingo Valley Expressway. The testimony of Robert F. Gardner corroborates this:

Q. Is the expressway right of way in a Corridor district?

A. No, it is not.
[Transcript, p. 482.] A-20.

The City's decision on Petitioner's land in 1985 was consistent with the treatment afforded all other properties similarly situated in the path of the extension of the Mingo Valley Expressway. A partial copy of the zoning map clearly shows there was RS-3 and AG zoning primarily in the path of the Mingo Valley Expressway. A-38--A-39.

C. The City did not attempt to depress market value of Petitioner's land through its zoning action.

Petitioner has accused the City of trying to "freeze" its property based on the alleged speculations of its witnesses Alberty and Parmele. However, Petitioner's "freeze" argument melts upon a close scrutiny of the testimony from the trial transcript. For instance, Mr. Parmele on direct

examination by the Petitioner admits he is an expert in real estate appraisal and that he does not believe the AG zoning depressed the value of Petitioner's land. [Transcript, Testimony of Robert L. Parmele, p. 192, ll. 5-10.] A-14--A-16.

In addition, Mr. Gardner flatly denied it was his or the City's intended object to depress the value of properties located in the path of the Mingo Valley Expressway through the zoning process. [Transcript, Testimony of Robert F. Gardner, p. 493, ll. 2-23.] A-22.

In *April v. City of Broken Arrow*, 775 P.2d 1347 (Okla. 1989), the Oklahoma Supreme Court held at page 1355 that as far as the United States Constitution is concerned, only the most extreme and onerous regulations can constitute a regulatory taking [which Petitioner has indirectly alleged]. The Oklahoma Supreme Court notes *in dicta* at p. 1355:

> ***City's mere refusal to rezone owner's property*** cannot be considered as either an actual taking or a de facto taking. [Emphasis added.]

There was sufficient evidence presented at trial to establish that the City's action in 1985 in not rezoning the 28 acres from AG to CO was a legitimate exercise of its police powers and not a taking.

Petitioner cites 9 A.L.R. 3rd 291, 304, and 305 for the proposition that courts have vigorously condemned as confiscatory the actions of a public body in denying rezoning merely for the purpose of decreasing land values in order to

lower acquisition costs in eminent domain proceedings. Petitioner fails to point out to the Court that 9 A.L.R. 3rd 291 on *Eminent Domain--Damages Zoning* contains a footnote numbered 20 at the bottom of p. 305 which reads as follows:

> 20. This should not be taken to mean that the condemning authority may not have the property evaluated in light of zoning restrictions which it enacted so long as the restrictions were ***enacted in good faith and not for the purpose of controlling the cost of condemnation.*** [Emphasis added.]

Petitioner also cites *Kissinger v. City of Los Angeles*, 327 P.2d 10 (Cal. 1958), for the proposition that governmental zoning action used to down zone property to depress values is invalid. However, it fails to set forth the Court's holding at page 14 that "***if there is any reasonable justification of the action of the council in passing the ordinance the court may not substitute its judgment for that of the trial court.***" [Emphasis added.]

Surely, the testimony of Mr. Gardner concerning the lawful purposes of CO zoning coupled with the Comprehensive Plan and Development Guideline criteria for CO zoning satisfies this rule with regard to the City's administrative zoning action in 1985. This is especially so given the clearly distinguishable facts in this case from those in *Kissinger, supra*. In *Kissinger*, the City Planning Commission violated Plaintiff's procedural due process rights by passing an ordinance that down zoned *only* the property of the Plaintiff

from commercial to residential in the airport flight path of property to be acquired for the City's own use. This was done without public hearing, in violation of the City of Los Angeles' own rules, treating the Plaintiff's property differently than other similarly situated properties in the area. Further, there was strong evidence in the motion and discussions of the council members who voted that the main purpose was to acquire the property at a lesser price for use by the airport. No such facts exist in the case before this Court showing a down zoning of Petitioner's property, disparate treatment of Petitioner when compared to other properties, and no violation of due process. Hence, nothing warrants the overturning of the City of Tulsa's zoning decision in 1985, based upon the previously cited trial transcript.

D. Petitioner presented evidence of commercial, industrial, and multi-family apartment uses and values.

Finally, as stated in Paragraph C of The Facts contained herein, the Petitioner put on substantial evidence of a highest and best use that was commercial, industrial and multi-family with appraisal values reflecting the same. How can it then complain of government action designed to depress values when its own evidence contradicts such an assertion? Moreover, the Respondent's evidence was also for non-agricultural uses and values as cited in Paragraph D of The Facts.

The jury awarded an amount of damages that was neither Petitioner's value conclusion nor the Respondent's value conclusion. Indeed, there was a Majority Report of Commissioners setting forth an estimate of just compensation at $1,200,000, and a Minority Report of Commissioners setting forth an estimate of just compensation at $605,620. A-32--A-37. The Respondent paid the $1,200,000 into Court and both parties filed a demand for jury trial. The Petitioner sought $3,000,000 in damages and the Respondent presented $534,200 in damages. The jury verdict of $708,200 was in between those two values. However, as noted in the case of *Lloyd v. State*, 428 P.2d 262 (Okla. 1967):

> . . . The fact that there is much disparity as to the amount of damages between the witnesses for the Plaintiff and Defendants, and the trial court chooses to accept the lowest amount of estimated damages, is not in error in and of itself. . . .

PROPOSITION II.

THE TRIAL COURT PROPERLY ALLOWED ODOT'S WITNESS JANICE K. GORDON TO TESTIFY IN ACCORDANCE WITH THE DISCRETION OF THE COURT.

The Petitioner has alleged that the Trial Court erred in exercising its discretion in allowing Respondent's expert

witness, Mrs. Janice Gordon, to testify.

Janice K. Gordon was certified by the trial court as an expert witness for the Plaintiff:

> MR GRAY: Your Honor, at this time we'd like to tender Mrs. Gordon as an expert in market trends with regard to land uses in southeast Tulsa.
>
> THE COURT: Very well.
>
> [Transcript, p. 544, ll. 19-22.] A-24.

The transcript shows there was no objection by Petitioner to her certification as an expert witness. [Transcript, p. 544, ll. 22-25; p. 545, ll. 1-2.] A-24.

Common law allowed a trial court to exercise its discretion in allowing expert witnesses to remain in the courtroom and the Oklahoma Supreme Court previously considered the effect of the enactment of 12 O.S. 1991 §2615 upon the common law rule of sequestration in *Clark v. Continental Tank Co.*, 744 P.2d 949 (Okla. 1987). At page 952 the Oklahoma Supreme Court stated that allowing an expert witness in the courtroom was in the trial court's discretion: "...It is clear that under the common law in Oklahoma such would have been allowed, absent abuse of the trial court's discretion." After a discussion of the legislative history, the Oklahoma Supreme Court concluded at page 953 the common law rule was still in effect: "We cannot conclude that the legislature, either intentionally or unintentionally,

altered that rule of procedure by adoption of the Evidence Code."

Appellant's citation of the statutory language contained in 12 O.S. 1991 §2615 is in error. Subsequent to the *Clark* decision, the legislature modified the statute to include the expert witness exception to the Rule of Sequestration by enacting Laws 1991, Chapter 62, Section 5, effective September 1, 1991. The revision in said Statute reads as follows:

> 3. A person whose presence is shown by a party to be essential to the presentation of the party's cause; . . . .

This statute was in effect at the time of trial.

After a lengthy *in camera* examination of Ms. Gordon by Petitioner, the Court at page 532 asked her:

> THE COURT: Ms. Gordon, let me ask you this. Is there anything at all about what you have heard, either from your husband or anyone else in the last three days since the trial started, that is going to change, color, or in any way affect your testimony that you're going to give?
>
> MRS. GORDON: No, sir.
>
> THE COURT: Well, I don't find

> anything that's violative of the rule. It is a discretionary thing so I think I should overrule your request, Mr. Levy. [Transcript, p. 532.] A-23--A-24.

The Trial Court acted well within its discretionary authority in allowing Janice Gordon to testify at trial, given Title 12 O.S. 1991, §2615, and the careful scrutiny of Mrs. Gordon by Petitioner's counsel and the trial judge. Moreover, Ms. Gordon was never in the courtroom during these proceedings except when she was called as a witness. The judgment of the Trial Court should be affirmed.

CONCLUSION

In summary, the Petitioner's Propositions I and II should be dismissed for the following reasons:

1. There is a statute of limitations barring Appellant from raising this claim in this appeal. [Accord, Title 12 O.S. 1992 §95(7)];
2. The weight of the evidence demonstrated that the City lawfully exercised its police powers in the rezoning request of the Appellant in 1985;
3. The only evidence of a highest and best use and value for Petitioner's property at trial was residential, office, industrial and commercial, not agricultural.

4. The Trial Court did not abuse its discretion in overruling Petitioner's *in camera* motion to disqualify Ms. Gordon.

Respectfully submitted,

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Attorneys for Respondent
State of Oklahoma, *ex rel.*,
Department of Transportation

A -1

METROPOLITAN DEVELOPMENT GUIDELINES
and
ZONING MATRIX

Parts of the Comprehensive Plan
for the
Tulsa Metropolitan Area

As adopted by Resolution No. 1658:630
Tulsa Metropolitan Area Planning Commission
(TMAPC)

TMAPC Approval: August 5, 1987
City Commission Approval: August 21, 1987
County Commission Approval: September 14, 1987

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and
LIST OF FIGURES

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INTRODUCTION

The Metropolitan Development Guidelines consist of four elements; Development District Goal and Objectives, Functional Area Goals and Objectives, Development District Concept, and Development District Implementation Policy. The Development Guidelines, as policy statements, are intended to provide increased efficiency and consistency in the decision making process. They are directed toward the issues of the quality of development and the living environment, and are essentially neutral in regard to the Balanced Metropolitan Growth Policy. They should not be interpreted as a land use plan or as a zoning code, but rather as a framework or guide within which sound planning, zoning, subdivision, investment and building decisions can be made by individuals and public officials and agencies. It is intended that, in the application of the Development Guidelines, an evaluation of existing conditions, including land uses, existing zoning and site characteristics, shall be considered.

The Development District Goal and Objectives, and the Functional Area Goals and objectives define the desired character and quality of development to be achieved. In this context, goals are long-range aims, while objectives are shorter range steps toward the fulfillment of goals. The Development District Concept provides the conceptual basis for development policies, while the Development District Implementation Policy sets forth the actions necessary to achieve the adopted policies.

DEVELOPMENT DISTRICT GOAL AND OBJECTIVES

GENERAL GOAL

Provide a quality living environment (housing, working, shopping and leisure) for all residents in a diversified community, so that every citizen has available a choice of a variety of lifestyles, and in a manner which will maintain or improve the quality of the natural and manmade environment.

GENERAL OBJECTIVE

Guide the metropolitan area's physical growth so that it may become an even more pleasant, desirable and attractive place in which to live, work and play in an area offering stabilized development, good living and working conditions, and a sound economic base and tax structure; and to assure maximum benefit to the people from public expenditures and private investment, through economical employment of resources, prevention of duplication and waste, and enhancement of property value.

DEVELOPMENT OBJECTIVES

1. Develop a flexible framework for decision making responsive to change, in order to maintain long-term viability and continuity in metropolitan development policy.

2. Differentiate and classify components of the metropolitan area so that a more rational

approach to land use planning can be effectuated.

3. Locate various intensities of development in accordance with manmade and natural systems.

4. Recognize existing high intensity areas established within the metropolitan area, and place additional uses of this type in optimum locations.

5. Develop areas only to the intensity that will not overload or overcrowd the planned public services and facilities.

6. Develop areas considering slope, soil, rock, vegetation and natural drainage characteristics.

7. Encourage quality development by the use of more responsive development tools, e.g. Planned Unit Development (PUD), site plan review, etc.

8. Initiate a major effort to make zoning a positive force in metropolitan development, rather than a negative one.

9. Develop reasonable planning standards for site design.

* * *

DEVELOPMENT DISTRICT CONCEPT

* * *

CORRIDORS

Corridors are located along freeways and are to contain major employment and region-serving functions in concert with a relatively high density residential base. No use, however, is permited as a matter of right in the Corridor Zoning District. The type and intensity of use is subject to the Corridor Site Plan review and approval process as specified in the Zoning Code. The basic characteristics of this component are:

1. Uses that are more intense in nature should have high exposure and convenient access to high capacity, metropolitan transportation facilities.

2. This multi-functional grouping of land uses should be interrelated by internal vehicular and pedestrian traffic systems, and the entire corridor should be ultimately connected to a metropolitan wide transit system.

3. Corridors should have appropriate access to primary and secondary arterial streets.

4. Corridors should have a maximum depth from the adjacent freeway.

5. Within corridors, the higher intensity development should be designed by utilization of setbacks, transitional uses, and other separations to be compatible with low intensity development.

* * *

* * *

DEVELOPMENT DISTRICT IMPLEMENTATION POLICY

* * *

CORRIDORS

The criteria, permitted land use and development conditions of the Corridor are as follows:

CRITERIA:

Land situated adjacent to existing, programmed (right-of-way acquired) or planned freeways is generally considered to be within either a Subdistrict or a Node, as are other areas of the Development District. No use is permitted as a matter of right in the Corridor Zoning District. The type of use and corresponding intensity of use is subject to the Corridor Site plan review and approval process as specified in the Zoning Code. Land may be deemed appropriate for high intensity development if the freeway is built or the right-of-way acquired (land acquisition program instituted which includes the subject property), unless in the particular instance the configuration of the corridor or existing development has

significantly impaired the accessibility of the corridor or rendered the achievement of sound land use relationships impractical. Thus, in order for high intensity uses to occur, a zoning application must first be made and granted placing a parcel in the Corridor Zoning District. Once a parcel has been designated as being in this zoning classification, high intensity development would only be allowed in compliance with an approved site plan. Additional criteria which apply are:

1. The arterial streets (parkway, primary and secondary) that bound land adjacent to expressways and intersect or interchange with expressways are designated as Freeway Access Arterial Streets (see Figure 2, page 11). The arterial streets (parkway, primary and secondary) that bound land adjacent to expressways and that do not intersect or interchange with an expressway are designated as Corridor Access Arterial Streets (see Figure 2, page 11).

2. In order that the capacity of the arterial street and expressway system may be maintained, access for a corridor development shall be principally from corridor collector streets.

3. No full movement access to the Corridor will be allowed along the

freeway access arterial street within 600 feet of the arterial intersection, or within 600 feet of the centerline of the freeway ramp.

4. There should be a maximum of three collector intersections, with full movement access, allowed along any segment of the corridor access arterial street. A spacing standard of 1,000 feet between collector streets connecting with a corridor access arterial street should be used unless topography would prohibit meeting this standard.

5. The Corridor internal collector street system, as shown in Figure 2 (page 11), should provide access to all tracts. This system should intersect as near as possible to the midpoint of the freeway access arterial street where access restrictions permit.

LAND USE:

1. Permits consideration of residential and non-residential uses, EXCEPT the following: Use Unit 3 - Agriculture, Use Unit 24 - Mining and Mineral Processing, Use Unit 25 - Light Manufacturing and Industry, Use Unit 26 - Moderate Manufacturing and Industry, and Use Unit 27 - Heavy Manufacturing and Industry.

2. The permitted intensity within the Corridor

Zoning District shall be that permitted by the approved Corridor Site Plan, but not the exceed the maximum intensity as specified in the Zoning Code.

DEVELOPMENT CONDITIONS:

1. Only land situated adjacent to a developed freeway or freeways where the right-of-way has been acquired (land acquisition program instituted which includes the subject property), and which is bounded by arterial streets will be considered for Corridor zoning.

2. Within areas previously zoned as Corridors, but within which the expressway right-of-way has not been acquired, the intensity of a proposed development may be limited to low or medium intensity, based on the anticipated scheduling of right-of-way acquisition and evaluation of existing land use and site conditions.

3. The Corridor shall have a maximum land area of 3,000 square feet for every foot of expressway frontage.

IN THE DISTRICT COURT FOR TULSA COUNTY, STATE OF OKLAHOMA.

Case No. CJ-90-958

DISTRICT COURT
FILED
OCT 01 1992
DON E. AUSTIN, COURT CLERK
STATE OF OKLA. TULSA, COUNTY

THE STATE OF OKLAHOMA, ex rel.
Department of Transportation,

Plaintiff,

vs.

D-LANDCO, an Oklahoma corporation,
and **BARBARA LASH,**

Defendants.

RECORD OF PROCEEDINGS had in the above-entitled cause on March 9, 10, 11, and 12, 1992, before the Honorable Ronald L. Shaffer, Judge of the District Court of Tulsa County, State of Oklahoma, and a jury of twelve.

APPEARANCES:

MR. STEPHEN P. GRAY
2865 East Skelly Drive, Suite 205
Tulsa, Oklahoma
Attorney for the Plaintiff

MR. LOUIS LEVY
5314 South Yale, Suite 310
Tulsa, Oklahoma
Attorney for the Defendants

REPORTED BY:

Kathie Schiermeister, CSR, CP-RPR, CM
Official District Reporter

VOLUME I of III
(pp. 2-227)

DISTRICT COURT OF OKLAHOMA
Official Transcript - Copy

TESTIMONY OF MR. WAYNE ALBERTY:

Page 132, Lines 5 - 24

Q. So wouldn't it be reasonable to say that corridor zoning is somewhat of a project influence resulting from the Mingo Valley Expressway?

A. Yes, that's by -- that's the sole purpose and definition of a corridor district, to be adjacent to high traffic expressways.

Q. Mr. Alberty, I'm going to hand you what has been marked as Defendant's Exhibit No. 40. If you would take a look at East 81st Street. Could you go one mile east on 81st Street between Garnett and 129th East Avenue, if you would. What type of zoning do you have on the north side of 81st Street there?

A. The north side is R-1 zoning.

Q. Now, R-1, that's residential zoning for purposes of the City of Broken Arrow, is it not?

A. Yes, that's correct. That's their low density zoning.

Q. And what's on the south side of 81st Street --

A. R-2.

Q. And, again, is that a residential single-family?

A. Yes, it's a single-family medium density.

Page 154, Line 22 through Page 155, Line 3

Q. Well, do you know if the property owner ever came back in after 1985, based on your review of the INCOG records, and ever requested the AG-zoned areas of 1A and 2A to be zoned to RS-3 or some other zoning use?

A. After 1985?

Q. Yes, sir.

A. Not to my knowledge.

TESTIMONY OF ROBERT L. PARMELE, JR.:

Page 192, Line 5 through Page 193, Line 23

Q. So the value of the property would remain lower if the property remained in an AG classification?

A. In their mind. Not in mine, but in theirs.

Q. Yes. Well, you're an appraiser and a real estate broker, are you not?

A. Yes.

Q. And there are no real estate brokers or appraisers on the staff of the planning commission, are there?

A. No, sir.

Q. All right, They're just doing it from a zoning standpoint.

A. Yes, that's correct.

Q. And wouldn't you agree with me that, generally speaking, agricultural zoning -- land that is agriculturally zoned will sell for less money than land that is zoned commercially.

A. Generally speaking, that would be true.

Q. All right. I've asked you to take a look at the D-Landco property from a highest and best use standpoint, have I not?

A. Yes, you have.

Q. Do you have an opinion, sir, as the chairman of the planning commission, as to the highest and best use of that property?

A. I have an opinion that the highest and best use will be some type of medium intensity uses.

Q. All right, sir.

A. Based on the physical facts of the surrounding uses of the other properties.

Q. Would any portion of the D-Landco property be commercial as a highest and best use?

A. Yes.

Q. Which portion?

A. The comprehensive plan, I believe the development guidelines would call for the corner ten acres of the property to be a commercial use.

Q. All right, sir. What about any of the property adjacent to Tulsa Junior College and 81st Street?

A. Based on the presence of the junior college, I think it would lend itself to a medium intensity development.

Q. All right, sir. So you could put a restaurant there maybe, like the restaurant across the street?

A. That would be possible.

Q. And you might put an office warehouse on that property?

A. It would be possible.

Page 198, Lines 16 - 22

Q. If D-Landco Corporation, after 1985, had applied to rezone the property to RS-3, some sort of more intense use than agricultural, of -- such as RS-3 particularly, could they have gotten it, in your opinion?

A. In my opinion, if they would have applied for rezoning on that particular tract that was reserved for RS-3 or higher intensity, it would be possible to get that, yes.

TESTIMONY OF MR. DALE KEELE:

Page 247, Lines 3 - 25

Q. So growth is continuing in this area; is that right?

A. Oh, yes, sir.

Q. All right, sir. Let me ask you, sir, if you arrived at an estimate of highest and best use for the D-Landco tract.

A. Yes, sir, I have.

Q. And define the term as you know it in the -- from a real estate appraisal standpoint.

A. The highest and best use is what would be feasible, legal, appropriately supported, physically feasible, and reasonably feasible.

Q. What, sir, in your opinion, is the highest and best use of the D-Landco property?

A. Commercial, industrial, and multifamily.

Q. And what was it on June the 8th of -- 9th of 1990?

A. Commercial, industrial, high density residential.

Q. What factors lend themselves to that sort of a conclusion and that sort of use?

A. You can see the neighborhood, how it's zoned and how the uses are being -- the land is being put to in the neighborhood. And this will give you an idea of what the use for this property would be. Being next to the junior college here would indicate that any type of commercial use would be greatly enhanced -- both of them would be enhanced by it.

TESTIMONY OF MS. CHRISTINE LIETZKE:

Page 366, Lines 1 - 24

Q. Please take the witness stand.
Define highest and best use for the jury as you understand that term.

A. Highest and best use?

Q. Yes.

A. Basically it's the use that will return to the owner the most money. In some very simple terms.

Q. What's your opinion as to the highest and best use of this piece of property?

A. Commercial.

Q. Would that be true with respect to the 28 acres in the take area?

A. In my opinion, before the take, it was all commercial.

Q. Okay. Do you know of any reason to suspect that that property might ever be developed residential in single-family homes? As a highest and best use?

A. Not in my opinion.

Q. What are the limiting factors to residential in your opinion? On this tract of land.

A. Well, I don't think a residential development is a successful when it backs up to a highway. I think the noise factor would be one. I have a

real hard problem seeing this as anything but commercial because of TJC, Golf World, and everything around it.

TESTIMONY OF ROBERT F. GARDNER:

Page 471, Lines 12 - 18

MR GRAY: Your Honor, at this time we would tender Mr. Gardner as an expert in the Tulsa Zoning Code with regard to comprehensive plan, the development guidelines, and the Tulsa Zoning Code and platting requirements.

THE COURT: Very well.

MR. LEVY: No objection, Your Honor.

THE COURT: He'll be so admitted.

Page 478, Line 21 through Page 479, Line 8

Q. Mr. Gardner, could you explain what you mean by "potential corridor."

A. Okay. The corridor is a unique process. In fact, it was developed as a part of the development guidelines, so the zoning code and the new code that we have, which was adopted in 1970, did not even have corridor zoning in it. In '75 when the zoning code was amended and recodified, we came out with the corridor zoning classification. And as I stated, by definition, it's dependent upon an expressway

being there to serve the area. If the expressway is there to serve the area, then we will consider the potential for higher intensity type uses. And here again, that depends upon also the surrounding land use in a given area.

Page 482, Lines 3 - 17

Q. Is the expressway right of way in a corridor district?

A. No, it is not. The expressway is the basis for having potential corridor zoning. Without the expressway -- I mean, the plan for the expressway, you can't have corridor zoning.

Q. Well, are you telling me that corridor zoning is project influence then, based on an expressway?

A. It's based on the expressway. And that's the only basis that it can be considered and approved.

Q. Well, let me ask you this. Without a planned expressway on the major street and highway plan, then you're not in a corridor district; correct?

A. That's correct.

Q. And then you couldn't get corridor zoning. Is that correct?

A. That's correct.

TESTIMONY OF MR. ROBERT F. GARDNER: (con't.)

Page 490

Q. Sir, have you reviewed the minutes associated with the zoning of the D-Landco property back in 1985?

A. Yes, I have.

Q. What did they ask for at that time, sir? If you recall.

A. They asked for corridor zoning. The property was zoned agricultural as I recall.

Q. Okay. It was totally zoned agricultural and they were asking to change it?

A. Yes.

Q. Now, again, can you get corridor zoning under the comprehensive plan in the path of the Mingo Valley Expressway?

A. No, you cannot. It's not consistent with the plan.

Q. Could they have gotten some other type of zoning? Besides corridor zoning?

A. If they'd have asked for it. Anything that would have been appropriate under the yellow. We would grant a single-family had they asked for it.

Q. Have you heard of something known as RS-3 zoning, sir?

A. Yes.

Q. Back in 1985, was RS -- excuse me, what is RS-3 zoning, Mr. Gardner?

A. It stands for residential single-family. The 3 means that it's a 60-foot-wide lot. 6,900 square foot minimum block.

Page 493, Lines 2 - 24

Q. Sir, if Mr. Alberty made a statement that it's your intended object or the City's intended object to depress values of property through the zoning process in the path of the Mingo Valley Expressway, or any expressway, do you have an opinion as to the veracity of that statement, sir?

A. That is an incorrect statement. The value of the property in the path of the expressway is whatever the land is worth, based upon the type of zoning they can receive without that expressway, and under the development guidelines, what they might be expected to receive. They could have received RS-3 under the development guidelines without the expressway. No one asked for it. So they weren't given RS-3.

Q. Sir, there's also been statements -- well, do you know a man by the name of Mr. Bob Parmele?

A. Yes, sir.

Q. Does Mr. Parmele speak for you, sir?

A. No, he does not.

Q. Does he speak for the staff of the Indian Nations Council of Governments?

A. No, he does not.

Q. Does he speak for the City of Tulsa?

A. No, he does not.

TESTIMONY OF MRS. JANICE K. GORDON:

Page 532, Lines 15 - 24

[BY MR. LEVY] I would at this time move to have this witness's testimony excluded on the basis of Title 12, Section 2615, the so-called rule of sequestration. The rule has been violated in that this witness has discussed critical testimony related to that testimony that she's been employed to present to the jury with her husband. For the past three days. And we think that's a violation of the rule and we think it would be highly prejudicial to our case for this witness to know what other witnesses have testified to, particularly in view of the fact that it was ODOT's attorney in this case who invoked the rule of sequestration. We have to live by it; we think that they should likewise have to honor the rule of sequestration.

THE COURT: Ms. Gordon, let me ask you this. Is there anything at all about what you have heard, either from your husband or anyone else in the last three days since the trial started, that is going to change, color, or in any way affect your testimony that you're going to give?

JAN GORDON: No, sir.

THE COURT: Well, I don't find anything that's violative of the rule. It is a discretionary thing so I think I should overrule your request, Mr. Levy.

MR. LEVY: Thank you, Your Honor.

Page 544, Line 19 through Page 545, Line 2

MR. GRAY: Your Honor, at this time we'd like to tender Mrs. Gordon as an expert in market trends with regard to land uses in southeast Tulsa.

THE COURT: Very well.

MR. LEVY: May I inquire, Your Honor?

THE COURT: Well, let's save it for cross, Mr. Levy.

MR. LEVY: All right.

THE COURT: Go ahead.

Page 553, Lines 5 - 25.

Q. Did you draw any conclusion as to a highest and best land use for the D-Landco property based on your survey of this study area?

A. Yes, sir.

Q. And what can you tell the ladies and gentlemen of the jury about that?

A. What this particular thing tells me is that based on the history of land uses there, that the

highest and best use of the D-Landco property would be single-family residential.

Q. Would there ever been any potential for commercial anywhere on the D-Landco property? In your opinion?

A. Yes, sir.

Q. And where would that be located?

A. The corner of 81st and Garnett would probably be suitable at some point in time, but it needs to be built up a little more before some -- like a convenience store requires 3,000 rooftops in a square mile radius, that would be their normal criteria to -- a radius isn't square, sorry. But in a one-mile radius in order to say that that would be a spot that they would use.

Q. Go ahead and have a seat, Mrs. Gordon.

TESTIMONY OF MR. RUSTY RICHARDSON:

Page 610, Lines 18 - 23

Q. What conclusion did you draw from your study of the marketplace with regard to more intense zonings developing single-family residential, Mr. Richardson?

A. Well, the only true market right now is for single-family. That is the highest and best use in most cases in this vicinity. . . .

CERTIFICATE

STATE OF OKLAHOMA)
) ss.:
COUNTY OF TULSA)

I, KATHIE SCHIERMEISTER, a Certified Shorthand Reporter in and for the State of Oklahoma, do hereby certify that the foregoing is a true and correct record of my notes taken in Case No. CJ-90-958, heard on the 9th, 10th, 11th, and 12th days of March 1992.

I further certify that I am not related to nor attorney for either of said parties nor otherwise interested in said action.

WITNESS MY HAND AND SEAL this 14th day of September, 1992.

s/Kathie Schiermeister
Kathie Schiermeister, CSR, CP-RPR, CM
Official District Reporter

Kathie Schiermeister
Oklahoma Certified Shorthand Reporter
Certificate No. 00351

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

STATE OF OKLAHOMA, EX REL., DEPARTMENT OF TRANSPORTATION,	)
Appellant,	)
vs.	) **NO. 79427**
D-LANDCO, INC., an Oklahoma corporation; BARBARA LASH; and THE TULSA COUNTY TREASURER	) **Case No. CJ-90-0958**
Appellee.	)

RESPONSE TO PETITION IN ERROR AND PRELIMINARY STATEMENT

A. OBJECTION TO APPEAL?

Should this appeal be dismissed at this time?

_____ Yes __X__ No

If your answer is yes, state the reasons briefly: _____

Exhibit "A" attached (not to exceed one 8-1/2" X 11" double spaced page).

B. IF OTHER THAN ENTIRE TRANSCRIPT IS DESIGNATED BY APPELLANT, ESTIMATE NUMBER OF ADDITIONAL PAGES NEEDED.

_____

C. IS APPELLEE WILLING TO PARTICIPATE IN AN ATTEMPTED SETTLEMENT OF THE APPEAL BY PRE-DECISIONAL CONFERENCE UNDER 3.7 IF OFFERED THE OPPORTUNITY?

___X___ Yes _____ No

D. WOULD APPELLEE BE WILLING TO ACCELERATE PROCEDURES FOR THIS APPEAL UNDER SUPREME COURT RULE? (Fast track) (See F(1), Petition in Error).

___X___ Yes _____ No

E. APPELLEE'S BRIEF STATEMENT AS TO PROCEEDING.

Exhibit "B" attached (not to exceed 8 1/2" double spaced page).

If not agreeable, why not? _____

DATE: _____, 19____

Verified by:

PICKARD, MILLER & GRAY
Co-counsel for the Plaintiff
Oklahoma Department of
Transportation

By:_____
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Oklahoma Department of
Transportation
200 N.E. 21st Street
Oklahoma City, Oklahoma 73105

G. AFFIDAVIT OF MAILING TO APPELLANT AND DISTRICT COURT CLERK (TRIBUNAL) ON DATE FILED IN SUPREME COURT

I hereby certify that a true and correct copy of the above and foregoing Response was mailed this _____ day of _____, 1992, by depositing it in the U.S. Mails, postage prepaid to:

Louis Levy
5314 S. Yale, Suite 310
Tulsa, Oklahoma 74135-6246

I further certify that a copy of the above and foregoing Response was filed in the Office of the Court Clerk of Tulsa County on the _____ day of _____, 1992.

_____
Stephen P. Gray

EXHIBIT "B"

On February 23, 1990 the Appellee (State of Oklahoma ex rel. Department of Transportation) filed a Petition to condemn 28.09 acres of land for the extension of the Mingo Valley Expressway. A Commissioner's Award of $1,200,000.00 was assessed and both parties demanded a jury trial. Depositions were taken of the plaintiff and the defendant's witnesses. The defendant's witnesses testified to two different highest and best use scenarios with regard to the fair market value of the property prior to trial. Indeed, even William Del Armstrong, president of D-Landco, at Page 19, Line 18-20 of his deposition dated March 29, 1991 testified his opinion of highest and best use was agricultural and then changed his testimony to commercial at the time of trial. A trial occurred March 9-12, 1992. The defendant presented the testimony of seven witnesses and the plaintiff presented the testimony of four witnesses. Nine members of a Tulsa County jury returned a verdict of $708,220.00 in favor of the Appellant. Whereupon Appellant appealed said jury verdict.

IN THE DISTRICT COURT OF TULSA COUNTY
STATE OF OKLAHOMA

State of Oklahoma, ex rel. Department of Transportation,	)	
Plaintiff,	)	
vs.	)	**Case No. CJ-90-958**
D-Landco Inc., an Oklahoma corporation; Barbara Lash; and the Tulsa County Treasurer,	)	
Defendants.	)	

MINORITY REPORT OF COMMISSIONERS

COME NOW the undersigned Commissioners appointed by the Judge of this Court to inspect the real property hereinafter described and to consider the injury or damages which the said defendants as above named as the owners thereof have sustained and may sustain by reason of the taking of said property. Said taking is in fee simple, unless specified otherwise in the legal descriptions(s) attached hereto in which case the quality of title or interest to be acquired herein shall be as stated in such legal description(s), including airspace but excluding mineral interests and

including the right to use and remove any and all road-building materials. The appropriation is for public purposes by the Department of Transportation of the State of Oklahoma. We, the undersigned, respectfully submit the following Report, to-wit:

The undersigned Commissioners were and are disinterested free holders of Tulsa County, Oklahoma. We are not interested in any like question. On the 23 day of April , 1990, said Commissioners took the oath prescribed on Exhibit "A", attached hereto and made a part hereof.

We further report that it is necessary for the Plaintiff, Department of Transportation, to acquire said property. It is necessary to include airspace but exclude mineral interests. It is also necessary to include the right to use and remove any and all road-building materials. Said necessity is for public purposes of a State Transportation System and facilities necessary and incidental thereto. Title to said described property must be taken by said Plaintiff for said purposes.

We further report that we have considered the injury which the defendants, as the owners of the property described, have sustained and may sustain by reason of the taking of said property by the Department of Transportation of the State of Oklahoma. We have considered the value of the land or rights or interest therein taken excluding any mineral interest other than as is set forth in the Petition. We have further considered the amount of injury and damages done to the remainder of the real estate, either directly or indirectly, by reason of said

taking. We do hereby assess the compensation and damages from all causes due said owners by reason of such taking of the described premises and in accordance with the Instructions to Commissioners, we find:

Before Value of entire property	$2,569,780
LESS the	
After Value of remaining property	$1,964,160
ESTIMATE OF JUST COMPENSATION	$ 605,620

IN WITNESS WHEREOF, we have hereunto set our hands on this 25 day of May, 1990.

COMMISSIONERS:

s/John Story

_____

_____

10917(02)
Parcel 168 & 168.1
??-31-90

A strip, tract or parcel of land lying in and being a part of the NE¼, Section 18, T 18 N, R 14 E, Tulsa County, Oklahoma, and more particularly described as follows:

Beginning at the Southwest corner of said NE¼; thence Easterly along the South line of said NE¼ a distance of 438.98 feet; thence N 11°23'21" W a distance of 157.91 feet; thence N 02°16'48" W a distance of 900.00 feet; thence N 02°29'01" E a distance of 301.04 feet; thence N 02°16'48" W a distance of 300.00 feet; thence N 11°45'22" E a distance of 309.23 feet; thence N 06°33'43" E a distance of 455.41 feet; thence N 34°06'16" E a distance of 181.91 feet; thence Easterly on a line parallel to the North line of said NE¼ a distance of 750.00 feet; thence N 0°55'31" W a distance of 30.00 feet; thence Easterly on a line parallel to the North line of said NE¼ a distance of 600.00 feet; thence N 0°55'31" W a distance of 50.00 feet to the North line of said NE¼; thence Westerly along said North line a distance of 2000.00 feet to the Northwest corner of said NE¼; thence Southerly along the West line of said NE¼ a distance of 2638.10 feet to the point of beginning.

The above described strip, tract or parcel of land contains 28.09 acres more or less of new right-of-way, the remaining area included in the above description being right-of-way occupied by the present roadway together with all abutters rights, including all rights to access from the remaining

EXHIBIT __A__

portion of defendant__ land onto the LIMITED ACCESS HIGHWAY to be constructed on the above described property, except that defendant__, ____ heirs, successors or assigns,

shall have the right of access to the Section Line Road, along the North side of the above described property, beginning at a point on the North line of the NE¼ a distance of 800.00 feet East of the Northwest corner of said NE¼ and extending East.

All bearings contained in this description are grid bearings derived from the USC&GS Oklahoma plane coordinate system and are not astronomical.

NOTE!! EXISTING FENCE IN THE TAKE AREA IS NOT TO BE CONSIDERED AS A VALUE FACTOR BECAUSE A NEW REPLACEMENT FENCE WILL BE INSTALLED BY THE STATE DURING CONSTRUCTION AT NO COST TO THE LANDOWNER.

Also: A temporary easement for the purpose of opening a stream channel on the following described tract:

A strip, tract or parcel of land lying in and being a part of the NE¼, Section 18, T 18 N, R 14 E, Tulsa County, Oklahoma, and more particularly described as follows:

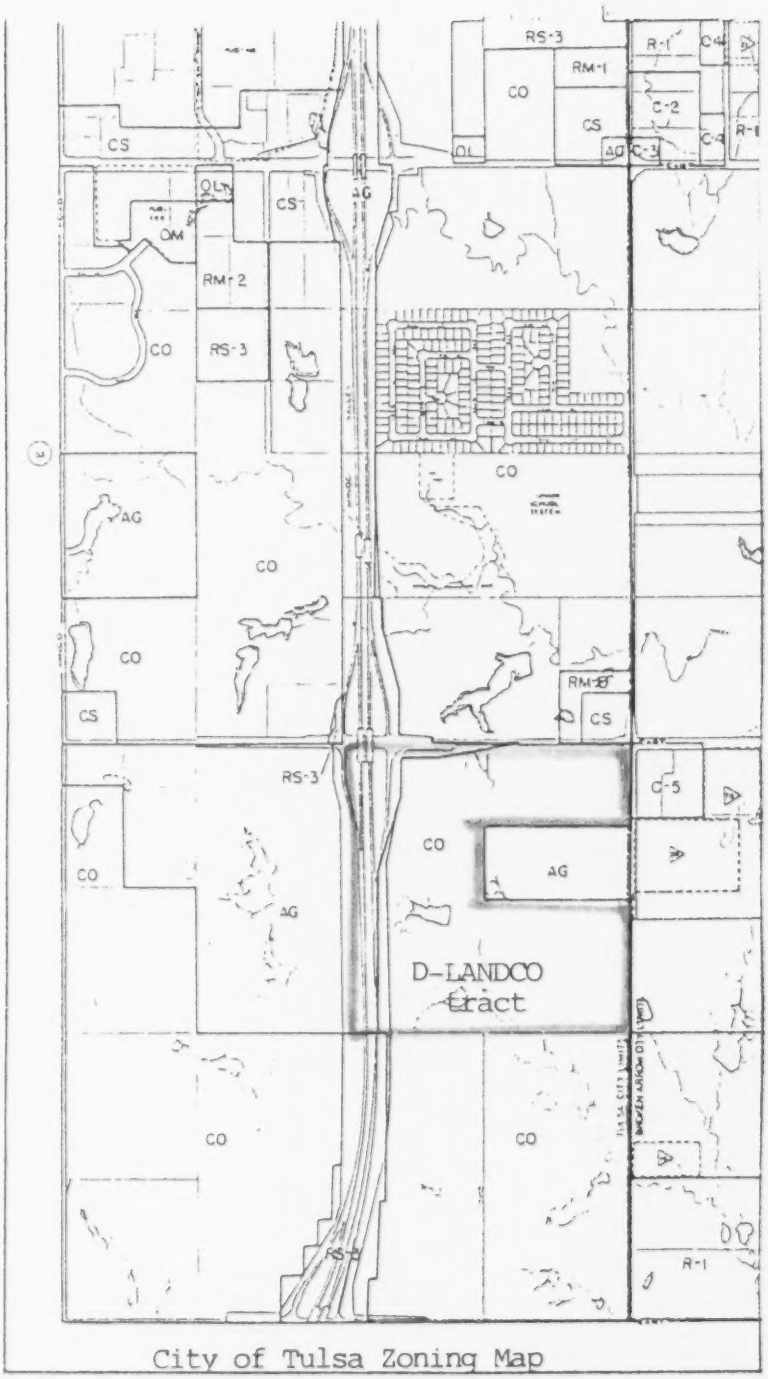
Beginning at a point on the permanent South right-of-way line of the Creek Turnpike a distance of 1139.79 feet West and 68.38 feet South of the Northeast corner of said NE¼; thence Westerly along said permanent South right-of-way line a distance of 100.00 feet; thence S 0°55'31" E a distance of 30.00 feet; thence S 89°04'29" W a distance of 200.00 feet; thence S 0°55'31" E a distance of 120.00 feet; thence Easterly

on a line parallel to and 200.00 feet South of the North line of said NE¼ a distance of 300.00 feet; thence N 0°55'31" W a distance of 150.00 feet to the point of beginning.

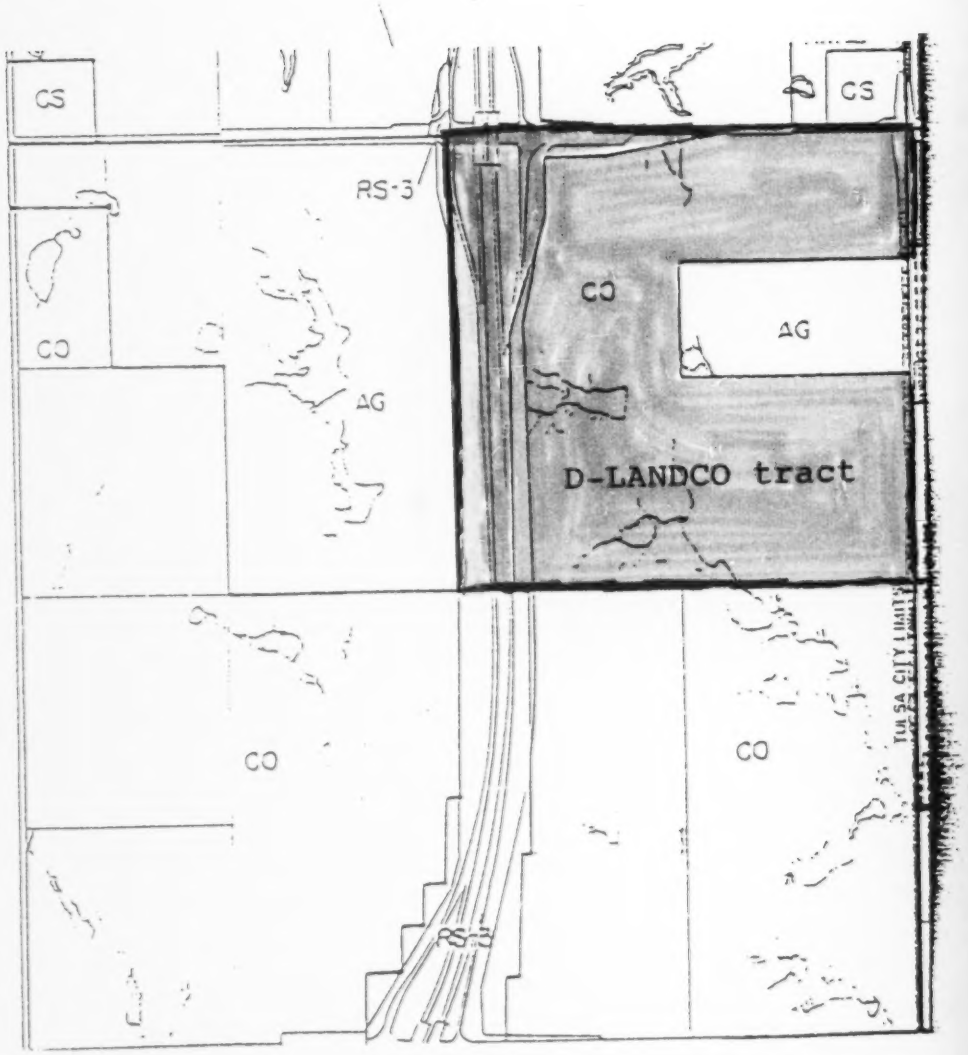
Containing 0.90 acres more or less.

All bearings contained in this description are grid bearings derived from the USC&GS Oklahoma plane coordinate system and are not astronomical.

This temporary easement will automatically expire at the completion of construction upon this highway project.



City of Tulsa Zoning Map



GREEN - Agricultural (AG)
PINK - Commercial (CO)